DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-291
Title: Eric L. Thompson, Petitioner
v.
North American Stainless, LP
Docketed: September 8, 2009
Lower Ct.: United States Court of Appeals for the Sixth Circuit
Case Nos.: (07-5040)
Decision Date: June 5, 2009
Questions Presented

---Date---	--------Proceedings and Orders----------
Sep 3 2009	Petition for a writ of certiorari filed. (Response due October 8, 2009)
Oct 2 2009	Order extending time to file response to petition to and including November 9, 2009.
Nov 9 2009	Brief of respondent North American Stainless, LP in opposition filed.
Nov 17 2009	DISTRIBUTED for Conference of December 4, 2009.
Nov 24 2009	DISTRIBUTED for Conference of December 11, 2009.
Nov 24 2009	Reply of petitioner Eric L. Thompson filed. (Distributed)
Dec 14 2009	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
May 25 2010	Brief amicus curiae of United States filed.
Jun 7 2010	Supplemental brief of petitioner Eric L. Thompson filed. (Distributed)
Jun 8 2010	DISTRIBUTED for Conference of June 24, 2010.
Jun 24 2010	DISTRIBUTED for Conference of June 28, 2010.
Jun 29 2010	Petition GRANTED.
Jul 20 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 24 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jul 28 2010	The time to file the joint appendix and petitioner's brief on the merits is extended to and including September 3, 2010.
Jul 28 2010	The time within which to file respondent's brief on the merits is extended to and including October 22, 2010.
Sep 3 2010	Joint appendix filed. (Statement of costs filed)
Sep 3 2010	Brief of petitioner Eric L. Thompson filed.
Sep 7 2010	SET FOR ARGUMENT Tuesday, December 7, 2010.
Sep 7 2010	Justice Kagan is recused in this case.
Sep 10 2010	Brief amicus curiae of United States filed.
Sep 10 2010	Brief amici curiae of National Employment Lawyers Association, et al. filed.
Sep 10 2010	Brief amici curiae of National Women's Law Center, et al. filed.
Sep 27 2010	CIRCULATED
Sep 27 2010	Record received from U.S.C.A. for Sixth Circuit. (1 box)
Oct 22 2010	Brief of respondent North American Stainless, LP filed. (Distributed)
Oct 27 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Oct 29 2010	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Oct 29 2010	Brief amici curiae of Equal Employment Advisory Council, et al. filed. (Distributed)
Nov 15 2010	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. Justice Kagan took no

part in the consideration or decision of this motion.

Nov 22 2010 Record ffrom U.S.D.C. for Eastern District of Kentucky (Frankfort) is electronic.

Nov 22 2010 Reply of petitioner Eric L. Thompson filed. (Distributed)

Dec 7 2010 Argued. For petitioner: Eric Schnapper, Seattle, Wash., and Leondra R. Kruger, Acting Principal Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Leigh Gross Latherow, Ashland, Ky.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

No. 09-
09-291 SEP 3 - 2009

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In The
Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The questions presented are:

(1) Does section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member or fiancé, closely associated with the employee who engaged in such protected activity?

(2) If so, may that prohibition be enforced in a civil action brought by the third party victim?

PARTIES

The parties to this proceeding are set forth in the caption.

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Petitioner Eric L. Thompson respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on June 5, 2009.

OPINIONS BELOW

The June 5, 2009 en banc opinion of the Court of Appeals, which is reported at 567 F.3d 804 (11th Cir.2009) (en banc), is set out at pp. 1a-63a of the Appendix. The March 31, 2008 opinion of the Court of Appeals, which is reported at 520 F.3d 644 (11th Cir.2008), is set out at pp. 64a-90a of the Appendix. The December 18, 2006 order and opinion of the District Court for the Eastern District of Kentucky, which is not reported, is set out at pp. 91a-94a of the Appendix. The June 20, 2006 opinion and order of the District Court, which is reported at 435 F.Supp.2d 633 (E.D.Ky.2006), is set out at pp. 95a-109a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on June 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved are set out in the Appendix.

STATEMENT OF THE CASE

Title VII of the 1964 Civil Rights Act, like other major federal employment statutes, forbids an employer to retaliate against an employee because he or she engaged in certain specified protected activities. For several decades there has been a growing conflict among the lower courts regarding cases in which the employer retaliates, not by taking action directly against the employee who engaged in the protected activity, but by instead inflicting reprisals on another person – typically a family member or fiancée – whose well being is of obvious importance to that employee. In the instant case that increasingly complex conflict resulted in an unusually splintered en banc decision in the Sixth Circuit, with five separate opinions charting distinct approaches to this recurring type of retaliation.

At the time when this action arose, Eric Thompson was an employee of North American Stainless, LP, as was Miriam Regalado. Thompson and Regalado were engaged to be married,[1] and "their relationship was common knowledge at North

[1] Thompson and Regalado were subsequently married.

American Stainless." (App. 66a). In September 2002 Regalado filed a charge with the Equal Employment Opportunity Commission, alleging that her supervisors had discriminated against her based on her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. Slightly more than three weeks later, on March 7, 2003, the defendant dismissed Thompson. Thompson alleges that he was fired in retaliation for his then-fiancée's (now wife's) EEOC charge. (App. 3a-4a).

Thompson filed a charge with the EEOC, which conducted an investigation and found "reasonable cause to believe that [the defendant] violated Title VII." (App. 4a). After conciliation efforts were unsuccessful, the EEOC issued a right-to-sue letter and Thompson brought this action against North American Stainless. Thompson's complaint alleged that the employer had dismissed him in retaliation for his then-fiancée's EEOC charge. Retaliating in that way, Thompson asserted, violated section 704(a) of Title VII, which forbids an employer to "discriminate against any of his employees ... because he has ... made a charge ... under this title." 42 U.S.C. § 2000e-3(a).

North American Stainless moved for summary judgment, contending that as a matter of law reprisals against a third party would not "support a

Title VII cause of action."[2] The District Court granted the motion and dismissed Thompson's complaint, holding that Title VII "does not permit third party retaliation claims." (App. 108a).[3]

A divided panel of the Sixth Circuit initially overturned the dismissal of the complaint. (App. 64a-90a). The court of appeals granted the employer's petition for rehearing en banc. A splintered en banc court upheld the dismissal of Thompson's complaint. (App. 1a-63a). In addition to the majority opinion, there were both a separate concurring opinion and three dissenting opinions. The various opinions of the Sixth Circuit disagreed about the proper disposition of the case, about what legal issue was controlling, and about whether the result arrived at by the majority was in conflict with decisions in other circuits.

The majority acknowledged that Thompson met the constitutional standard for standing under Article III. (App. 9a n.1). Because the remedy sought by Thompson included both damages and reinstatement, the defendant did not dispute the existence of Article III standing. The majority also held that Thompson had standing to sue under the terms of section 706(f)(1) of Title VII itself. (*Id.*). The majority

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[2] North American Stainless's Memorandum in Support of Motion for Summary Judgment, 5.

[3] The District Court subsequently denied a motion to reconsider its decision in light of this Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006). (App. 91a-94a).

concluded, however, that Title VII did not provide a "cause of action" for a plaintiff such as Thompson. (App. 9a-29a). Section 704(a), the majority held, was "plain and unambiguous" in specifying that an action to enforce section 704(a) can be brought only by a person who engaged in protected activity. (App. 2a).[4]

Judge Rogers concurred in the result, but rejected the reasoning of the majority opinion. The majority, he objected, had confused the question of what retaliation is unlawful under section 704(a) with the issue of who can sue to enforce that provision.

> [Section 704(a)] dictates what practices amount to unlawful retaliation, not who may sue. The question of who may sue is simply not addressed by § [704(a)].... My difference with the majority is founded on a concern that by relying on the language of the provision stating what is unlawful, rather than on the language of the provision

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[4] In a footnote the court noted that

> [a]ll of the parties in this case agreed at oral argument that if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to § 704(a) and, under *Burlington Northern [& Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)], defendant's termination of Thompson potentially could be deemed an "adverse action" against her.

(App. 29a n.10). The court did not state whether it agreed with the defendant's oral concession.

> regarding who can sue, the holding may be misinterpreted to preclude claims by protected persons, like Regalado, for retaliation in the form of harm imposed on people that (the employer knows) the protected persons care about.

(App. 29a-33a). The type of retaliation alleged in this case, the concurrence insisted, would be unlawful under section 704(a). (App. 30a). Judge Rogers concluded, however, that a third party victim such as Thompson could not sue to enforce that prohibition. Section 706(f)(1) authorizes any "person aggrieved" to file suit to enforce Title VII. The majority held that the phrase "person aggrieved" encompassed any person with standing under Article III, and thus included plaintiff Thompson. (App. 9a n.1). Judge Rogers, on the other hand, disagreed that standing under section 706(f)(1) "was intended to be as broad as Article III permits." (App. 31a n.1). Rather, he insisted, "person aggrieved" in the retaliation context means only the person who engaged in the protected activity. (App. 32a).

There were three dissenting opinions joined by a total of six members of the court of appeals. Judge White[5] correctly observed that third party reprisals actually present two distinct issues. "The relevant questions are whether defendant violated § 704(a) and whether Thompson is a person aggrieved by that

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[5] This dissenting opinion was joined by Judge Daughtrey.

violation." (App. 62a). Third party reprisals, White insisted, are forbidden by section 704(a). (App. 53a). Judge White maintained that the majority opinion had confused the issue of whether such retaliation is unlawful under section 704(a) with the issue of who can file suit to enforce that provision.

> [T]he plain language of § 704(a) ... does not tell us "*who* falls under the umbrella of its protection," [(App. 27a)], but rather *what* conduct is prohibited.... The majority ... conclude[s] that even if Thompson can prove such a case, he cannot maintain the action because he is not the person who opposed the unlawful practice. The majority bases this conclusion on the plain meaning it ascribes to § 704(a), notwithstanding that § 704(a) does not purport to address the question who can bring a charge or maintain an action based on a violation....

(App. 58a-60a) (emphasis in original). "[O]nce the employer's conduct is found to violate § 704(a), there is no reason to look back to that section to determine who may maintain an action based on the violation." (App. 58a). The question of who may maintain such an action, White explained, is addressed instead by section 706(f)(1), which authorizes a civil action by any "person aggrieved." (*Id.*).

> Thus, to answer the question whether Thompson can sue based on a § 704(a) violation, we need ask whether Thompson is aggrieved by the unlawful employment practice. Accepting the allegations as pled,

> Thompson, himself, is unquestionably claiming to be aggrieved.

(App. 58a).

Judge Moore, in a second dissenting opinion,[6] objected that the majority opinion permitted employers to retaliate with impunity by inflicting reprisals on the family or friends of a person who engaged in protected activity. (App. 43a-44a). Even if the party who had engaged in the protected activity were permitted to sue, Judge Moore noted, he or she would not be able to obtain meaningful relief for the third party victim. (App. 43a-44a n.5). Judge Moore noted that the majority opinion conflicted with decisions in the Seventh and Eleventh Circuits which "have recognized the need to interpret § 704(a) broadly to include third-party retaliation claims." (App. 44a n.6.). Moore objected that the majority had improperly ignored this Court's decisions construing section 704(a). "I am baffled by the majority's downplaying of important Supreme Court precedent in this arena" (App. 38a); "I do not believe that these Supreme Court decisions can be so cavalierly dismissed." (App. 50a). Judge Moore's dissent also disagreed with the analysis of section 706(f)(1) in Judge Rogers' concurring opinion. (App. 50a-53a).

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[6] This dissenting opinion was joined by Judges Martin, Daughtrey, Cole, Clay and White.

In a third dissenting opinion, Judge Martin[7] rejected the premise of the majority opinion that section 704(a) is "plain and unambiguous." (App. 33a). "Section 704(a) is broader than [the majority] thinks and, at minimum, ambiguous." (*Id.*). Judge Martin believed that the ambiguity of section 704(a) had been recognized by both the majority and concurring opinions in *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (2009), a reading of *Crawford* which the en banc majority had rejected. (Compare App. 18a-23a (majority opinion) with App. 34a-37a (Martin, J., dissenting)). Because section 704(a)

> is ambiguous, determining whether plaintiffs like Thompson should be allowed to sue ought to depend on how much weight Congress could have given the "important practical implications" ... Judge Moore identif[ies].... I would hold these claims cognizable.

(App. 37a).

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[7] This dissenting opinion was joined by Judges Daughtrey, Moore, Cole, Clay and White.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decided Incorrectly An Important Issue of Law Which Should Be Resolved by This Court

(1) A sharply divided Sixth Circuit has held that the anti-retaliation provision of Title VII provides no judicial redress for one of the most widely condemned forms of reprisal. "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co.*, 823 F.3d 1086, 1087 (7th Cir.1987). Such reprisals against an individual's family or close associates have a long and unfortunate history as a method of punishing enemies, deterring conduct, and coercing disclosure of information, and remain all too common in news accounts of events both at home and abroad.[8]

The ramifications of the decision below reach well beyond Title VII. Virtually all major federal statutes governing the employment relationship prohibit employers from retaliating against employees for engaging in certain specified protected activity. The question of whether third party reprisals are forbidden and redressable has arisen under a wide variety of those statutes: the National Labor Relations Act,[9] the Americans With Disabilities

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[8] See e.g. *Wilson v. Libby*, 535 F.3d 697 (D.C. Cir.2008).

[9] See pp. 20-21, 26-28, *infra*.

Act,[10] the Age Discrimination in Employment Act,[11] the Occupational Safety and Health Act,[12] the Family and Medical Leave Act,[13] the Rehabilitation Act,[14] Employee Retirement Income Security Act,[15] the Equal Pay Act,[16] the Whistleblower Protection Act,[17] the Federal Mine Safety and Health Act,[18] Title IX,[19] and 42 U.S.C. § 1981.[20]

The problem of statutory interpretation posed by this practice is similar under all of these statutes. Each of these laws, like Title VII, forbids an employer in general terms from taking action against an employee because he or she has engaged in protected

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[10] *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir.2002).

[11] *Fogelman*, *supra*.

[12] *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir.1994).

[13] *Elsensohn v. Parish of St. Tammany*, 2007 WL 1799684 (E.D.La.).

[14] *Mutts v. Southern Connecticut State University*, 2006 WL 1806179 (D.Conn.).

[15] *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir.1989).

[16] *Marshall v. Georgia Southwestern College*, 489 F.Supp. 1322, 1331 (M.D.Ga.1980).

[17] *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 447 (1991).

[18] *Secretary of Labor v. Leeco, Inc.*, 24 FMSHRC 589, 591, 2002 WL 31412752 at *3 (F.M.S.H.R.C.).

[19] *Dawn L. v. Greater Johnstown School Dist.*, 586 F.Supp.2d 332, 380 (W.D.Pa.2008).

[20] *Allen-Sherrod v. Henry County School Dist.*, 2007 WL 1020843 at *3 (N.D.Ga.).

activity. But none of these statutes contains a specific list of the methods of retaliation that are forbidden, and none of these laws provides a special remedial mechanism for any particular type of retaliation. Because of the parallel structure of these statutes, the lower courts in analyzing third party reprisal claims under any one law have routinely relied on decisions interpreting the anti-retaliation provisions of other statutes.

It is of great importance whether the victims of third party reprisals can obtain redress, because that type of retaliation can be a highly effective method of obstructing enforcement of the law.[21] The district

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[21] *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561, 568-69 (3d Cir.2002) ("There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights"); *Holt v. JTM Industries, Inc.*, 89 F.3d 1224, 1233 (5th Cir.1996) (Dennis, J., dissenting) ("the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA"); *Rainer v. Refco, Inc.*, 464 F.Supp. 742, 746 (S.D.Ohio2006) ("[c]learly, if an employer were free to discharge any relative of an employee who complained about discrimination without fear of liability, there would be a chilling effect on the inclination of employees whose relatives were part of the same workforce to complain about discrimination"); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206, 1210 (E.D.Cal.1998) ("an interpretation [that permitted third party reprisals] would chill employees from exercising their Title VII rights against unlawful employment practices out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative"); *Clark v. R.J. Reynolds Tobacco Co.*, 1982 WL 2277 at *7 (E.D.La.) ("[p]laintiff's son would certainly be deterred from exercising his

(Continued on following page)

judge in this case, although concluding that Sixth Circuit precedent barred any action for third party reprisals, candidly recognized that "retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against." (App. 108a). To deny judicial redress to those third party victims

> would encourage employers to take reprisals against the friends, relatives, and colleagues of an employee who have asserted a[discrimination] claim. Through coercion, intimidation, threats, or interference with an employee's co-workers, an employer could discourage an employee from asserting such a claim.

Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 630, 660 A.2d 505, 508 (1995).

In the absence of an enforceable prohibition against that practice, employers could deliberately

> evade the reach of the [anti-retaliation] statute by making relatives or friends of complaining parties the "whipping boys" for the protected conduct of others.

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rights under Title VII if there was a threat that his former employer would fire his father if he were to file a charge of discrimination against it"); *De Medina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C.1978) ("tolerance of third-party reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII").

Holt v. JTM Industries, Inc., 89 F.3d at 1233 (Dennis, J., dissenting). For an employer intent upon retaliating against a worker who has engaged in protected activity, the decision below creates a grotesque incentive to do so by punishing the worker's relatives or friends. As the EEOC has repeatedly warned, if third party reprisals are not prohibited – or if any such prohibition is incapable of meaningful enforcement – an employer could adopt an express policy of inflicting such reprisals.

> [A]n employer could openly use the threat of third-party retaliations to ban the very activities protected by Section 704(a). An employer could adopt a policy of seeking reprisals in any case in which an employee protested discrimination, filed a charge with the Commission, or otherwise participated in the enforcement process. That policy could require the termination of any relative, friend, or co-worker of the individual engaging in the protected activity.[22]

In practice a single unredressed reprisal could be a powerful deterrent to protected activity. In the wake of the dismissal of petitioner Thompson, and of the Sixth Circuit decision that followed, any worker of ordinary prudence at North American Stainless could

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[22] Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. Ohio Edison Co.* (No. 92-3173) (6th Cir.), text at n.1.

be understandably reluctant to file a charge with the EEOC.

The decision of the Sixth Circuit offers no meaningful check on such abuses. A worker who engaged in protected activity would rarely have suffered any significant injury of his or her own as the result of a third party reprisal, and that employee would lack Article III standing to seek relief for the third party victim. Ms. Regalado as a plaintiff would have had no Article III standing to obtain an award of back pay or damages payable to, or reinstatement for, her then-fiancé.

In the legal framework of Title VII, limiting any claim regarding third party reprisals to actions by the worker who engaged in protected activity – and excluding claims by the actual third party victim – would in this regard render section 704(a) unenforceable. A plaintiff cannot bring suit under Title VII without first filing a charge with the EEOC. But it would never occur to most couples that if one of them is the victim of a third party reprisal, the *other* employee would have to complain to the EEOC. "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 440 U.S. 522, 527 (1972).

(2) Reprisals against a third party are assuredly an unlawful *method* of retaliating against an employee for engaging in protected activities. The employer in this case clearly "discriminate[d]"

against Regalado for filing a Title VII charge. In March 2003 the employer did not punish *all* of its workers by firing their fiancés; rather, it selected only Regalado (and *her* fiancé) for that sanction. *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), makes clear that section 704(a) forbids "the many forms that effective retaliation can take." 548 U.S. at 64. Nothing in the language of section 704(a) excludes from its prohibition the use of third party reprisals.

The touchstone of illegality under *Burlington Northern* is whether a particular reprisal would be "likely to dissuade employees from complaining or assisting in complaints about discrimination." 548 U.S. at 70. The district court in the instant case correctly recognized that reprisals against third parties can be every bit as effective in deterring protected activity as more direct reprisals against those who engage in such activities. (App. 108a). Indeed, as the EEOC has repeatedly noted, threats of reprisals against third parties could be especially efficacious.

> [T]he fact that retaliation is against a third party only enhances the pressure on the employee contemplating the exercise of protected activity. Where an employee has already been the target of discrimination, the threat of economic sanction may be outweighed by the employee's personal desire to vindicate her statutory rights. If the employer, however, could reach into the workforce to target other employees, the

> aggrieved employee may be more reluctant to assert her statutory rights. In that case, the employee risks not only her own economic future, which has already been threatened by the employer, but the future of her fellow workers as well.[23]

If section 704(a) were construed to permit third party reprisals,

> such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

548 U.S. at 64. Employees would not be "'completely free from coercion against reporting' unlawful practices," 548 U.S. at 67, if – as the decision below permits – "employers can use Thompson, and others like him, as swords to keep employees from invoking their statutory rights with no redress for the harms suffered by those individuals." (App. 43a-44a) (Moore, J., dissenting).

In *Burlington Northern* this Court cited as an example of "effective[] retaliat[ion] against an employee ... causing him harm outside the workplace" the reprisal in *Rochon v. Gonzalez*, 438 F.3d 1211,

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[23] Brief of the EEOC as Amicus Curiae In Support of the Appellant, *Fogelman v. Mercy Hosp.*, (No. 00-2263) (3d Cir.) at 25-26.

1213 (D.C. Cir.2006), in which the FBI retaliation against the employee "took the form of the FBI's refusal ... to investigate death threats a federal prisoner made against [the Special Agent] and *his wife*." 548 U.S. at 63-64 (emphasis added and omitted).[24] It is inconceivable that in a situation such as *Rochon* section 704(a) permits a government agency to retaliate against a law enforcement officer who filed a charge with the EEOC by refusing to protected his or her family from death threats.

The EEOC has long interpreted section 704(a) to forbid an employer to retaliate against a worker who engaged in protected activity by inflicting reprisals on a relative or other associated individual. The Commission has applied this interpretation in a series of administrative determinations and adjudications dating from 1977.[25]

> Section 704(a)['s] ... broad based protection should not be undermined by allowing the [employer] to accomplish indirectly what

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[24] Cf. 548 U.S. at 72:

> White *and her family* had to live for 37 days without income. *They* did not know during that time whether or when White could return to work. White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused.... (" ... No income, no money, and that made *all of us* feel bad ... ")

(Emphasis added).

[25] EEOC Decision 77-34, 1977 WL 5345 (EEOC); see EEOC Decision No. 72-1267, 1972 WL 4006 (EEOC).

> it cannot accomplish directly.... Certainly, where it can be shown that an employer discriminated against an individual because he or she was related to a person who filed a charge, it is clear that the employer's intent is to retaliate against the person who filed the charge.... [I]f such retaliation has occurred, it has occurred against both the person who previously filed a charge and that person's relative.... The National Labor Relations Board in similar circumstances has frequently held that discrimination against an employee because he or she has a familial relationship with a union activist violates the National Labor Relations Act.[26]

The EEOC has extended this interpretation to the other federal statutes which it enforces, and has codified that construction in its Compliance Manual.

> The retaliation provisions of Title VII, the ADEA, the EPA and the ADA prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights. For example, it would be unlawful for a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge.

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[26] EEOC Decision No. 77-34, 1977 WL 5345 at *1.

2 EEOC Compliance Manual § 8.II(B)(3)(c) (footnote omitted). The Commission has consistently advanced that interpretation of section 704(a) by filing suit on behalf of the victims of third party reprisals[27] and by submitting amicus briefs in support of private lawsuits raising such claims.[28]

The EEOC is not alone in construing federal anti-retaliation statutes in this manner. Since at least 1962 the National Labor Relations Board has consistently interpreted the National Labor Relations Act to forbid reprisals against third parties because of protected activities by union members, officials or supporters.

> A restraint on the exercise of employee rights is readily apparent where ... the supervisor is discharged because she is the wife of an employee who has engaged in union or other protected activities.... Under these circumstances, the rank-and-file employees ... can

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[27] *EEOC v. Wal-Mart Stores, Inc.*, 576 F.Supp.2d 1240 (D.N.Mex.2008) (retaliation against children because of protected activity of mother); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206 (E.D.Cal.1998) (retaliation against brother because of protected activity of sister); *EEOC v. V & J Foods, Inc.*, 2006 WL 3203713 (E.D.Wis.) (retaliation against daughter because of protected activity of mother).

[28] Brief of the EEOC as Amicus in Support of Thompson and for Reversal, *Thompson v. North American Stainless, LP* (No. 07-5040) (6th Cir.), available at 2007 WL 2477626; Brief of the EEOC as Amicus Curiae in Support of the Appellant, *Fogelman v. Mercy Hosp.* (No. 00-2263) (3d Cir.), available at 2001 WL 34119171.

> "reasonably ... fear that the employer would take similar action against them if they continued to support the Union." *Jackson Tile Manufacturing Co.* [122 NLRB 764 (1958)].

Golub Bros. Concessions, 140 NLRB 120, 127 (1962). The NLRB has applied this interpretation of the NLRA in cases in which the injured third party was a non-supervisory employee, a supervisory employee, or an independent contractor.[29] This longstanding construction of the NLRA is important because this Court has repeatedly looked to the NLRA in interpreting Title VII. *Burlington Northern*, 548 U.S. at 66-67.

The Department of Labor has repeatedly interpreted in the same manner the federal employment laws which it enforces. In *Reich v. Cambridgeport Air Systems, Inc.*, the Department of Labor advanced a

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[29] *Advertisers Mfg. Co.*, 280 NLRB 1185, 1186 (1986) (retaliation against mother because of protected activities of son); *International Union of Operating Engineers, Local 400*, 265 NLRB 1316, 1320 (1982) (retaliation against wife for protected activities of husband; independent contractor); *Hickman Garment Co.*, 216 NLRB 801 (1975) (retaliation against daughter-in-law because of protected activities of mother-in-law); *American Buslines, Inc.*, 211 NLRB 947, 948 (1974) (retaliation against wife for protected activities of husband); *Forest City Containers, Inc.*, 212 NLRB 38, 40 (1974) (retaliation against worker because of protected activity of her fiancé's mother); *Ridgely Mfg. Co.*, 207 NLRB 83, 88-89 (1973) (retaliation against wives because of protected activities of husbands).

similar construction of the anti-retaliation provision of the Occupational Safety and Health Act. (See 29 U.S.C. § 660(c)(1)). Relying on precedents regarding section 704(a) and the NLRA, the Department argued that the anti-retaliation provision of OSHA forbids third party reprisals.[30] In *Marshall v. Georgia Southwestern College*, 489 F.Supp. 1322 (M.D.Ga.1980), the Department successfully brought suit under the Equal Pay Act arguing that the anti-retaliation provision of that statute forbad forcing a male employee to resign his position because his wife had filed a complaint about discrimination in compensation. (See 29 U.S.C. § 215(a)(3)). The Department interprets the anti-retaliation provision of the Federal Mine Safety and Health Act in the same way, there too relying on cases holding that third party reprisals violate the NLRA and Title VII.[31] (See 30 U.S.C. § 815(c)).

(3) The en banc court clearly erred in holding that section 704(a) does not afford a plaintiff like Thompson a cause of action. The cause of action accorded to Thompson, and to all other Title VII plaintiffs, is in section 706(f)(1), not section 704(a). Section 706(f)(1) of Title VII provides that "a civil action may be brought against the respondent named in the charge ... by the person claiming to be

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[30] Brief for the Secretary of Labor, *Reich v. Cambridgeport Air Systems, Inc.* (1st Cir.1994) (No. 93-2287) at 18-21, available at 1994 WL 16506060.

[31] *Secretary of Labor v. Leeco, Inc.*, 24 FMSHRC 589, 591, 2002 WL 31412752 at *3 (F.M.S.H.R.C.).

aggrieved." The en banc majority acknowledged that Thompson was a "person aggrieved" within the meaning of section 706(f)(1). (App. 9a n.1). Because Thompson was a person aggrieved, section 706(f)(1) expressly provided him with a cause of action.

The en banc court erred in relying on *Davis v. Passman*, 442 U.S. 228 (1979). (App. 6a). The issue in *Davis* was "whether a private cause of action should be implied from a federal statute," or in that case a constitutional provision, that did not contain an express cause of action. 442 U.S. at 241; see *Cort v. Ash*, 422 U.S. 66 (1975). But *Davis* and *Cort v. Ash* are of no application here, because Title VII itself contains in section 706(f)(1) just such an express cause of action.

The concurring opinion below contended that Thompson is not a "person aggrieved" under section 706(f)(1), arguing that this phrase should be narrowly interpreted so that it encompasses, not every plaintiff with Article III standing, but only the particular individual whose rights under Title VII – in this case under section 704(a) – were violated. (App. 30a-32a). That narrow construction of the phrase "person aggrieved" in section 706(f)(1), however, is precluded by this Court's decision in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). *Trafficante* held that the phrase "person aggrieved" in Title VIII of the Civil Rights Act of 1968 encompasses all individuals with Article III standing, and expressly relied on a construction of that same phrase in Title VII.

> *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (CA 3), which dealt with the phrase that allowed a suit to be started "by a person claiming to be aggrieved" under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), concluded that the words used showed "a congressional intention to define standing as broadly as is permitted by Article III of the constitution." *Id.* at 446. With respect to suits brought under the 1968 Act, we reach the same conclusion....

409 U.S. at 366-67 (footnote omitted). The very purpose of legislation that broadly defines in this manner the persons authorized to seek judicial relief is to permit claims by individuals such as petitioner Thompson who might otherwise be precluded by the prudential standing requirement that a plaintiff "must assert his own legal interests rather than those of third parties." *Gladstone v. Village of Bellwood*, 441 U.S. 91, 100 (1979).

II. There Are Inter-Circuit Conflicts Regarding The Questions Presented

The lower courts are divided about the legal sufficiency of claims by the victims of third party reprisals. As Judge Moore noted below, the majority decision in the instant case is contrary to decisions in several other circuits. (App. 44a n.6). "Among the ... courts that have addressed the issue no consensus has emerged." *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561, 568 (3d Cir.2002); see *Holt v. JTM*

Industries, Inc., 89 F.3d 1224, 1233 (5th Cir.1996) (Dennis, J., dissenting) (majority decision precluding third party reprisal claims "flies in the face of ... federal court decisions ... [and] ignores the overwhelming weight of decisions construing the anti-retaliation provision of Title VII.")[32]

As several of the opinions below correctly recognized, the confusion among the lower courts is aggravated by the fact that third party reprisal claims actually pose two distinct legal questions:

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[32] *Elsensohn v. Parish of St. Tammany*, 2007 WL 1799684 *4 (E.D.La.) ("[a]t the very least, ... it is apparent that there exists a divergence of opinion on the viability of third party retaliation claims in general"); *Strickland v. Aaron Rents, Inc.*, 2006 WL 770578 at *7 (W.D.Tex.) ("while the law of most other Circuits supports [the plaintiff's claim], that is not so in the Fifth Circuit"); *Rubin v. Kirkland Chrysler-Jeep, Inc.*, 2006 WL 1009338 at *8 (W.D.Wash.) ("[t]he case law appears conflicted"); *Mutts v. Southern Connecticut State University*, 2006 WL 1806179 at *8 (D.Conn.) ("[c]ourts have split on whether merely being related to another person who engages in protected activity is sufficient"); *Sacay v. The Research Foundation of the City University of New York*, 193 F.Supp.2d 611, 633 (E.D.N.Y.2002) ("Courts of Appeals for other circuits ... have split on the issue"); *Reiter v. Metropolitan Transportation Authority of New York*, 2002 WL 31190167 at *7 (S.D.N.Y.); *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F.Supp.2d 1123, 1143 (D.Kan.2002) ("circuit and district courts ... fall into two camps"); *Miller v. Bed, Bath & Beyond*, 185 F.Supp.2d 1253, 1273 (N.D.Ala.2002) ("courts appear split on the ... issue"); *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.2d 672, 677 (Ct.App.Tex. 14th Dist.2007) ("[t]here is a split of authority among federal courts"); *Millstein v. Henske*, 722 A.2d 850, 854 (D.C.Ct.App. 1999) ("federal courts have divided").

whether such reprisals are unlawful, and whether the law authorizes the third party victims of such reprisals to obtain judicial redress. The second question, as the highly splintered Sixth Circuit decision makes clear, requires the courts to grapple with the important distinctions among Article III standing, prudential standing, and the existence of a cause of action.

The en banc decision of the Sixth Circuit compounds the existing divisions among the lower courts regarding these questions by adopting a new legal standard that differs from the positions of all sides in these ongoing judicial controversies.

A. There Is An Inter-Circuit Conflict Regarding Whether Third Party Reprisals Are Unlawful

The federal agencies responsible for the enforcement of federal anti-retaliation statutes have for decades consistently insisted that those laws forbid the use of third party reprisals as a method of retaliating against a person who engaged in protected activities. The courts of appeals, however, have reached conflicting conclusions regarding whether such a prohibition exists.

The courts of appeals have repeatedly concluded that the anti-retaliation provisions of the National Labor Relations Act do forbid third party reprisals. In *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir.1987), the Seventh Circuit held that reprisals

against supervisory officials violate the NLRA – even though those supervisors by definition have no protected rights under the Act – because such reprisals, unless corrected, would deter protected activity by non-supervisors. In ordering reinstatement of a female supervisor who had been fired in reprisal for the pro-union actions of her son, the court of appeals acknowledged that

> supervisory employees ... have no statutory right to engage in concerted activities.... If, as the Board found ... , the company fired [the mother] because of her son's union activities, there could be only one purpose, and that was to intimate union supporters ... If the company had fired [the son] in retaliation for his election as chief shop steward, there would be no question that it had violated the Act. Instead it fired his mother. If he loves his mother, this had to hurt him as well.... An effective method of getting at him, a protected worker, it is barred by the statute.... [The mother] is ... being reinstated so that ... protected employees will not be deterred from exercising their rights ... by fear that if they do the company will try to get back at them in any way it can, including firing their relatives.

823 F.3d at 1088-89. In *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.3d 400 (3d Cir.1990) (en banc), the Third Circuit ordered the reinstatement of a supervisor who had been dismissed because of the pro-union activities of her father, sister and daughters.

> [The supervisor] did not in any way aid the union's cause, and her reinstatement was not ordered to protect her right to participate in union activities. Rather, her reinstatement was ordered to demonstrate to the employees and supervisors at Kenrich that our labor laws do not permit employers to intimidate protected employees by using family members as hostages.

907 F.2d at 410. The District of Columbia Circuit construes the NLRA in the same manner. *Tasty Baking Co. v. NLRB*, 254 F.3d 114, 127 (D.C. Cir.2001) (retaliation against wife for protected activities of her husband).

The circuit courts have interpreted a number of other federal employment laws to protect the victims of third party reprisals. In *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir.1994), the First Circuit upheld a retaliation claim under OSHA regarding the dismissal of a worker who was a "particularly close friend[ ]" of a worker who had complained about health and safety problems. That reprisal, the trial court had concluded, was inflicted to "'impress the other employees' not to associate with health and safety advocates." 26 F.3d at 1189. In *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1037-38 (11th Cir.1985), the Eleventh Circuit upheld the imposition of liability under the Equal Pay Act against an employer which had retaliated against a husband because of his wife's protected activity.

In *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir.1989) (opinion joined by Breyer, J.), the First Circuit upheld a third party reprisal claim under Employee Retirement Income Security Act. Section 510 of Employee Retirement Income Security Act, in language similar to section 704(a) of Title VII, forbids a plan to "discriminate against a participant or beneficiary for exercising any right to which *he* is entitled under the provisions of an employee benefit plan." 29 U.S.C. § 1140 (emphasis added). The plaintiff alleged that he had been dismissed because his wife had filed suit to enforce her rights under the employer's medical plan. 882 F.2d at 589. The First Circuit rejected the employer's argument that section 510 did not forbid reprisals against the spouse of a beneficiary who had exercised such rights.

> Codex ... advocates a painfully strict construction of 29 U.S.C. § 1140.... Codex maintains that a suit can only be brought by a participant or beneficiary who has been retaliated against for exercising his or her *own* rights under a plan.... Neither logic nor the language of the statute support such a cramped interpretation. Under the theory advanced by Codex, it would be illegal for an employer to discharge an employee in retaliation for exercising rights under a plan but legal to fire an employee if it is the participant's spouse ... who exercises those rights. We reject this narrow construction. It clashes with the congressional intent of protecting ... the exercise of rights under an ERISA plan.

Id. (emphasis in original).

The illegality of third party reprisals under Title VII was initially unquestioned by the courts of appeals. In *Wu v. Thomas*, 863 F.2d 1543 (11th Cir.1989), the Eleventh Circuit overturned the dismissal of a complaint filed by a husband who alleged he had been removed from his position because of the protected activities of his wife. The court of appeals rejected the defendant's contention that the complaint should be dismissed because only the wife, the employee who had engaged in protected activities, had filed an EEOC charge. 863 F.2d at 1547-48. A substantial number of district courts rely on *Wu v. Thomas* as establishing the viability of third party reprisal claims.[33] In *Iturbe v. Wandel & Golterman Technologies, Inc.*, 1994 WL 118103 (4th Cir.), the Fourth Circuit resolved on the merits a claim that a husband had been transferred in retaliation for protected activities by his wife.

In *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir.1996), the Seventh Circuit refused to limit the application of section 704(a) to reprisals against the

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[33] *Riley v. UOP LLC*, 244 F.Supp.2d 928, 940 (N.D.Ill.2003); *Palisano v. City of Clearwater*, 219 F.Supp.2d 1249, 1259 (M.D.Fla.2002); *Reiter v. Metropolitan Transportation Authority*, 2002 WL 31190167 at *7 (S.D.N.Y.); *Gonzalez v. New York State Dept. of Correctional Services*, 122 F.Supp.2d 335, 347 (N.D.N.Y.2000); *Thomas v. American Horse Shows Assoc., Inc.*, 1999 WL 287721 at *12 (E.D.N.Y.); *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108, 1117 (W.D.N.Y.1996).

particular individual who had engaged in protected activity.

> [I]n the ordinary case an employer would have no reason to retaliate against someone who did *not* file a complaint, testify, etc. Generally, one retaliates against someone because of something he did rather than because of something someone else did. Not always. There is such a thing as collective punishment.... [A] literal interpretation of the provision would leave a gaping hole in the protection....

84 F.3d at 262 (emphasis in original). Section 704(a), the court held, should be construed to reach cases of "genuine retaliation," even where the reprisal is directed at someone who did not engage in protected activity. In *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878 (7th Cir.1998), the Seventh Circuit assumed that the *McDonnell* view that section 704(a) prohibits "collective punishment" meant that a wife was protected from reprisals because of the protected activity of her husband. 134 F.3d at 886. District courts in the Seventh Circuit treat *McDonnell* and *Drake* as establishing that third party reprisals violate section 704(a).[34]

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[34] *Wegeng v. Papa John's USA, Inc.*, 2006 WL 1207259 (S.D.Ill.) (holding actionable retaliation against wife because of protected activity of husband); *Whittaker v. Northern Illinois University*, 2003 WL 21403520 (N.D.Ill.) (holding actionable retaliation against husband because of protected activity of ex-wife).

In *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir.2002), the Third Circuit held that third party reprisals violate a provision of the Americans With Disabilities Act, but are not unlawful under the Age Discrimination in Employment Act. The ADA forbids an employer to

> coerce, intimidate, threaten or interfere with any individual in the exercise or enjoyment of or on account of *his or her* exercising or enjoyed ... any right ... protected by this chapter.

42 U.S.C. § 12203(b) (emphasis added). The Third Circuit explained that this provision forbids third party reprisals because

> action taken against the third party employee can have the effect of coercing the employee engaged in protected activity, and may also coerce other employees of the company from engaging in protected activity in the future.

283 F.3d at 570 n.5. The Third Circuit also held, on the other hand, that the anti-retaliation provision of the ADEA, "only prohibit[s] retaliation against a person who himself engaged in protected activity." 283 F.3d at 568; see *id.* at 568 (reprisals against third parties not "actionable" under the ADEA), 568-70.

In *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir.1998), the Eighth Circuit concluded that section 704(a) of Title VII does not "prohibit employer from taking adverse action against employees whose

spouses or significant others have engaged in statutorily protected activity against the employer." 151 F.3d at 819.

B. There Is An Inter-Circuit Conflict Regarding Whether Third Party Reprisals Can Be Redressed In An Action Brought by The Third Party Victim

The courts of appeals disagree as to whether, if third party reprisals are unlawful, the third party victims of such reprisals can sue for redress. That question implicates three distinct issues: constitutional standing, prudential standing, and the existence of a cause of action.

First, any claimant in federal court must have constitutional standing, a sufficient interest in the outcome of the dispute that it presents a genuine case or controversy. The irreducible minimum of constitutional standing is that the claimant must show that he or she will in fact benefit if the courts award the requested relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). That is not in doubt in this case or any action in which a third party victim seeks monetary relief or reinstatement in a job from which he or she was dismissed.

Second, in some instances a plaintiff must also satisfy the prudential standing requirement that the injury complained of must have arisen from a violation of his or her own rights, rather than from a violation of the rights of some other party. This requirement, however, is not constitutional in nature;

Congress may if it wishes authorize suit by plaintiffs who have been injured by the violation of the rights of others. Several provisions of the Fair Housing Act of 1968, for example, provide for suit by any "person aggrieved" by discrimination; this Court has repeatedly held that that language authorizes suit by any individual with Article III standing, even though his or her injury was the result of the violation of someone else's rights. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972). Section 706(f)(1) uses the same language, providing for suit under Title VII by any "person ... aggrieved."

Third, an individual who files a claim in federal court must also have a private cause of action to enforce the underlying statute. On a number of occasions Congress has enacted statutes without including an express right of action; in such situations the courts must decide whether to infer the existence of a cause of action. Whether the courts will infer such a private right of action for a particular plaintiff depends in part on whether the he or she is within the class of persons whom the statute was enacted to protect. *Cort v. Ash*, 422 U.S. 66 (1975). With regard to Title VII, however, there is no need to apply this line of cases, because the statute has an express cause of action; section 706(f)(1) provides that "a civil action may be brought ... by the person claiming to be aggrieved."

Against that background, several courts of appeals have concluded that third party victims are

entitled to maintain an action for redress. Thus in *Fitzgerald v. Codex Corp.* the First Circuit, having held that third party reprisals violate Employee Retirement Income Security Act, ruled that the third party victim "is entitled to sue." 882 F.2d at 590. In *Fogelman v. Mercy Hospital* the Third Circuit, having concluded that such reprisals violate a provision of the ADA, held that the plaintiff "may assert his third-party retaliation claim under this section of the ADA." 283 F.3d at 570; see *id.* at 570 n.5 (third party plaintiffs have a "cause[ ] of action.")

With regard to prudential standing, four circuits have concluded more generally that section 706(f)(1), in providing for suits by any "person aggrieved," authorizes suit by any individual with Article III standing, regardless of whether his or her injury stemmed from a violation of the rights of another party. *Anjelino v. The New York Times Co.*, 200 F.3d 73 (3d Cir.2000); *Kyles v. J.K. Guardian Sec. Services, Inc.*, 222 F.3d 289, 296 (7th Cir.2000); *Horne v. Firemen's Retirement System of St. Louis*, 69 F.3d 233, 235 (8th Cir.1995); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1278 (D.C. Cir.1994). Under this interpretation, because Thompson clearly has Article III standing, section 706(f)(1) would authorize Thompson to sue for redress of injuries he suffered as a result of a violation of Regalado's section 704(a) rights.

In *Holt v. JTM Industries, Inc.*, on the other hand, a divided panel of the Fifth Circuit ruled that a third party subjected to retaliatory reprisals cannot

sue under the ADEA. The victims of such reprisals, it held, do not have "standing to sue for retaliation when a relative or friend engages in protected activity." 89 F.3d 1224, 1226 (5th Cir.1996). "[T]he plain language of the statute," the majority insisted, precluded suits by those injured. 89 F.3d at 1226. The dissenting member of the panel, relying on this Court's decision in *Trafficante,* argued that actual language of the ADEA authorizing suit by "[a]ny person aggrieved" encompassed claims by such third party victims. 89 F.3d at 1228-29 (Dennis, J., dissenting). Subsequent Fifth Circuit decisions applying *Holt* have held that the direct victims of third party reprisals do not have standing to sue under Title VII[35] or the Family and Medical Leave Act.[36]

In the instant case the Sixth Circuit adopted an interpretation of Title VII different from all of these circuits. The court below expressly rejected the holding of the Fifth Circuit decision in *Holt*.

> To the extent that the *Holt* court characterized the viability of the plaintiff's claim as an issue of "standing," ... we disagree with its analysis. *See ... Holt*, 89 F.3d at 1228-30 (Dennis, J., dissenting).

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[35] *Ramirez v. Gonzales*, 225 Fed.Appx. 203, 209 (5th Cir.2007).

[36] *Elsensohn v. St. Tammany Parish Sheriff's Office*, 530 F.3d 368, 374 (5th Cir.2008).

(App. 13a n.4). Unlike the courts which have concluded that Title VII authorizes suit by any person with Article III standing, on the other hand, the Sixth Circuit held that the victims of third party reprisals do not have a "cause of action." It reasoned that "Congress created a retaliation cause of action" only for those who "oppose an unlawful employment practice, made a charge, testify, assist, or participate in an investigation." (App. 8a).

The decision of the en banc court is at odds with the circuits that have correctly recognized that it is section 706(f)(1) – which applies to any "person aggrieved" – that provides the cause of action to enforce Title VII. *Smith v. Casellas*, 119 F.3d 33, 34 (D.C. Cir.1997) ("the private right of action provided for in section 706(f)(1)"); *Etemad v. United States*, 1993 WL 114831 at *1 (9th Cir.) ("[t]he private right of action ... under section 706(f)(1)"); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349, 1351 (5th Cir.1977) ("section 706(f)(1)'s ... private cause of action").

The Sixth Circuit may leave open the possibility that an employee who engaged in protected activity might have a cause of action to seek redress for the victim of a third party reprisal. The Fourth Circuit, however, has rejected just such a claim, holding that an individual who engaged in protected activity does not have Article III standing to seek relief for the victim of a third party reprisal. *Smith v. Frye*, 488 F.3d 263, 272-73 (4th Cir.2007) (son lacks Article III standing to maintain action to redress reprisals against mother).

III. This Case Is An Appropriate Vehicle for Resolving The Questions Presented

This case presents an excellent vehicle for resolving the questions presented. The decisions of the courts below dismissing Thompson's complaint rest squarely and exclusively on those issues. The complaint itself clearly alleged that Thompson was dismissed as a reprisal for Regalado's action in filing a charge with the EEOC. The asserted retaliation strikes at the very heart of the Title VII enforcement scheme, because if successful it would both obstruct the EEOC's access to information about substantive violations and imperil the willingness of discrimination victims to pursue the administrative process that is a prerequisite to access to the courts. The close relationship between Regalado, who engaged in the protected activity, and her then-fiancé (now husband) Thompson, who was the victim of the alleged reprisal, starkly illustrates the type of situation in which third party reprisals would be particularly effective.

The legal issues raised by the questions presented have been aired with unusual thoroughness in the five opinions of the en banc court, supplemented by the two panel opinions and the two district court decisions. The discussion in those nine opinions of the range of statutory and interpretative considerations posed by the problem of third party reprisals is substantially more exhaustive than any of the scores of earlier lower court decisions that have considered this problem.

The uniquely fractured nature of the en banc court is an additional consideration supporting a grant of certiorari. En banc decisions resulting in five different appellate opinions are exceptionally uncommon. In this instance those divisions mirror the widespread division and confusion that exists among the lower courts, and make apparent the need for guidance from this Court.

This splintered en banc decision highlights the uncertainty that exists regarding whether section 704(a) – and the other anti-retaliation provisions in federal employment statutes – provide enforceable protection against third party reprisals. Delay in the definitive resolution of these issues by this Court will force workers in the Sixth Circuit and elsewhere to run the risk of third party reprisals whenever they complain to federal agencies or to the federal courts about violations of federal law.

Under the decision of the court below, the very act of cooperating with EEOC investigators now carries a clear and unredressable risk of harm. EEOC officials in the Sixth Circuit who investigate charges of discrimination under Title VII, the ADEA, the ADA, or the Equal Pay Act have been placed in the untenable position of having to choose between warning witnesses that their cooperation may lead to unredressable reprisals against their families or close associates – an admonition likely to deter cooperation with the Commission's investigations – or deliberately withholding that information from witnesses,

and encouraging those employees to assist the Commission unaware of the risks that they run.

Certiorari should be granted to eliminate this dilemma now faced by federal officials, and to prevent the specter of third party reprisals from impeding employee access to and the availability of information to the federal agencies that enforce the nation's employment statutes.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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United States Court of Appeals,
Sixth Circuit.

Eric L. THOMPSON, Plaintiff-Appellant,
v.
NORTH AMERICAN STAINLESS, LP,
Defendant-Appellee.

No. 07-5040.

Argued Dec. 10, 2008.

Decided and Filed June 5, 2009.

ARGUED: David O'Brien Suetholz, Segal, Lindsay & Janes, Louisville, Kentucky, for Appellant. Leigh Gross Latherow, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellee. Gail S. Coleman, U.S. Equal Employment Opportunity Commission, Washington, D.C., for Amici Curiae. ON BRIEF: David O'Brien Suetholz, Joseph Delano Wibbels, Jr., Segal, Lindsay & Janes, Louisville, Kentucky, for Appellant. Leigh Gross Latherow, Gregory L. Monge, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellee. Gail S. Coleman, U.S. Equal Employment Opportunity Commission, Washington, D.C., Rae T. Vann, Norris, Tysse, Lampley & Lakis, LLP, Washington, D.C., Nelson D. Cary, Alexandra T. Schimmer, Vorys, Sater, Seymour & Pease LLP, Columbus, Ohio, for Amici Curiae.

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON,

COOK, McKEAGUE, GRIFFIN, KETHLEDGE, and WHITE, Circuit Judges.

GRIFFIN, J., delivered the opinion of the court, in which BOGGS, C.J., BATCHELDER, GILMAN, GIBBONS, SUTTON, COOK, McKEAGUE, and KETHLEDGE, JJ., joined. ROGERS, J. (pp. 816-18), delivered a separate opinion concurring in the result. MARTIN, J. (pp. 818-20), delivered a separate dissenting opinion, in which DAUGHTREY, MOORE, COLE, CLAY, and WHITE, JJ., joined, with MOORE, J. (pp. 820-26), joined by MARTIN, DAUGHTREY, COLE, CLAY, and WHITE, JJ., and WHITE, J. (pp. 826-30), joined by Judge DAUGHTREY, also delivering separate dissenting opinions.

OPINION

GRIFFIN, Circuit Judge.

The sole issue raised in this rehearing en banc is whether § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a), creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity. After applying the plain and unambiguous statutory text, we join the Third, Fifth, and Eighth Circuit Courts of Appeal in holding that the authorized class of claimants is limited to persons who have personally engaged in protected activity by opposing a practice, making a charge, or assisting or participating in an investigation. Because plaintiff Eric L. Thompson does not claim that he personally engaged in any

protected activity, we affirm the judgment of the district court granting summary judgment in favor of defendant North American Stainless, LP.

I.

The relevant facts are recited in our vacated panel opinion, *Thompson v. North American Stainless, LP,* 520 F.3d 644, 645-46 (6th Cir.2008), *reh. en banc granted, opinion vacated* (July 28, 2008):

From February 1997 through March 2003, the plaintiff, Eric L. Thompson, worked as a metallurgical engineer for defendant North American Stainless, LP, the owner and operator of a stainless steel manufacturing facility in Carroll County, Kentucky. Thompson met Miriam Regalado, currently his wife, when she was hired by the defendant in 2000, and the couple began dating shortly thereafter. At the time of Thompson's termination, he and Regalado were engaged to be married, and their relationship was common knowledge at North American Stainless.

According to the complaint, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) in September 2002, alleging that her supervisors discriminated against her based on her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. Slightly more than three weeks later, on March 7, 2003, the defendant terminated Thompson's employment. Thompson alleges that he was terminated in

retaliation for his then-fiancée's EEOC charge, while North American Stainless contends that performance-based reasons supported the plaintiff's termination.

Thompson filed a charge with the EEOC, which conducted an investigation and found "reasonable cause to believe that [the Defendant] violated Title VII." After conciliation efforts were unsuccessful, the EEOC issued a right-to-sue letter and Thompson filed a cause of action against North American Stainless in the Eastern District of Kentucky.

North American Stainless moved for summary judgment, contending that the plaintiff's claim, that his "relationship to Miriam Thompson [née Regalado] was the sole motivating factor in his termination," was insufficient as a matter of law to support a cause of action under Title VII. The district court granted the defendant's motion, holding that Thompson failed to state a claim under either the anti-discrimination provision contained in 42 U.S.C. § 2000e-2(a) or the anti-retaliation provision set forth in 42 U.S.C. § 2000e-3(a).

The plaintiff appeals from this judgment, contending that the anti-retaliation provision of Title VII prohibits an employer from terminating an employee based on the protected activity of his fiancée who works for the same employer. The EEOC has filed an *amicus curiae* brief in support of plaintiff's position.

II.

We review de novo the district court's order granting summary judgment. *Kleiber v. Honda of Am. Mfg., Inc.*, 485 F.3d 862, 868 (6th Cir.2007). Summary judgment is warranted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED.R.CIV.P. 56(c).

III.

When Congress enacted the Civil Rights Act of 1964, it created a new and limited cause of action for retaliation in the employment setting. The relevant language of the statute provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . *because he has opposed* any practice made an unlawful employment practice by this subchapter, or *because he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII of the Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) (emphasis added).

Certainly it was Congress's prerogative to create – or refrain from creating – a federal cause of action for civil rights retaliation and to mold the scope of

such legislation, making the boundaries of coverage either expansive or limited in nature: "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Davis v. Passman,* 442 U.S. 228, 240, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979).

When we, in turn, are called upon to review and interpret Congress's legislation, "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States,* 242 U.S. 470, 485, 37 S.Ct. 192, 61 L.Ed. 442 (1917). "If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning." *Id.* at 490, 37 S.Ct. 192. Recognizing the consequences of unbridled judicial forays into the legislative sphere, the Supreme Court has admonished "'time and again that a legislature says in a statute what it means and means in a statute what it says there.'" *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy,* 548 U.S. 291, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). Accordingly, "[w]hen the statutory language is plain, the sole function of the

courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.* (internal citations and quotation marks omitted). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("[The courts'] inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal citation and quotation marks omitted); *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.").

In our view, the text of § 704(a) is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, plaintiff must show that his employer discriminated against him "because *he has opposed* any practice made an unlawful employment practice by this subchapter, or because *he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added).

Significantly, Thompson does not claim that he engaged in any statutorily protected activity, either on his own behalf or on behalf of Miriam Regalado. In Paragraph 13 of his complaint, Thompson alleges that "[d]efendant has intentionally retaliated against Plaintiff because his wife, Miriam Thompson, filed a charge with the [EEOC] based on gender

discrimination prohibited by 42 U.S.C. § 2000e-2(a). *Plaintiff's relationship to Miriam Thompson was the sole motivating factor in his termination.*" (Emphasis added.) In his appellate brief to our three-judge panel, Thompson framed his "Statement of the Issue" on appeal as follows: "Whether § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), prohibits an employer from terminating an individual in retaliation for the protected activity of his fiancée who also works for the employer." Further, he alleged in his "Statement of Facts" that "Thompson was terminated in retaliation for his fiancée's protected activity."

By application of the plain language of the statute, Thompson is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation. Nonetheless, with the support of the EEOC, he argues that the statute should be construed to include claimants who are "closely related [to] or associated [with]" a person who has engaged in protected activity. Thompson and the EEOC offer various reasons why we should disregard the text of the statute in favor of their public policy preferences. The primary contention is that a "narrow" interpretation of § 704(a) would create an "absurd" result. Further, they argue that we should defer to the EEOC's interpretation of the statute. These assertions are dependent upon the premise that the statutory language is ambiguous. It is not.

In essence, plaintiff and the EEOC request that we become the first circuit court to hold that Title VII creates a cause of action for third-party retaliation on behalf of friends and family members who have not engaged in protected activity. However, we decline the invitation to rewrite the law.

IV.

The central issue before this court is whether Thompson has asserted a proper cause of action under § 704(a) of Title VII – that is, whether he "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court" to enforce legislatively created rights or obligations. *Davis*, 442 U.S. at 239 n. 18, 99 S.Ct. 2264.[1] It is well

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[1] Distinct from the question whether Thompson has asserted a cause of action under § 704(a), his *standing* to assert his Title VII retaliation claim is not at issue in this appeal. *See Davis*, 442 U.S. at 239 n. 18, 99 S.Ct. 2264 (distinguishing the separate concepts of standing and cause of action and noting that "*standing* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction. . . ."). The remedial section of Title VII, 42 U.S.C. § 2000e-5(f)(1), empowers a "person claiming to be aggrieved" to bring a civil action to enforce the prohibitions against unlawful employment practices contained in the substantive provisions of the statute. "What it means to be 'aggrieved' is a question of standing. . . ." *Leibovitz v. New York City Transit Auth.*, 252 F.3d 179, 185 (2d Cir.2001).

There is no question that "[t]his Court has taken a broad view of standing in Title VII actions." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 517 (6th Cir.1976); *see also Christopher v.*

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established that to prevail upon a Title VII retaliation claim, "a plaintiff must establish that: (1) [he] engaged in activity protected by Title VII; (2) this exercise of protected rights was known to the defendant; (3) the defendant thereafter took an adverse employment action against the plaintiff; and (4) there was a causal connection between the protected activity and the adverse employment action." *Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir.2008).

The district court ruled correctly that Thompson failed to establish the first element because his

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Stouder Mem. Hosp., 936 F.2d 870, 876 (6th Cir.1991) ("The fact that [§ 2000e-5] purports to provide remedies for a class broader than direct employees is a strong indication that the proscriptions contemplated by [§ 2000e3] reach beyond the immediate employment relationship.") (quoting *Sibley Mem. Hosp. v. Wilson*, 488 F.2d 1338, 1341 (D.C.Cir.1973)). We have held that the "person claiming to be aggrieved" language of § 2000e-5 shows a congressional intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution. *EEOC v. Bailey Co., Inc.*, 563 F.2d 439, 452-54 (6th Cir.1977); *Senter*, 532 F.2d at 517.

Defendant does not challenge Thompson's standing as an "aggrieved" person, and we are satisfied in our own right that Thompson meets the "irreducible constitutional minimum of standing" required for his Title VII claim, *i.e.*, (1) he suffered an injury-in-fact (termination of his employment), (2) as a result of defendant's putatively illegal conduct, and (3) it is possible, instead of merely speculative, that his injury is redressable. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Michigan*, 470 F.3d 286, 291-92 (6th Cir.2006).

complaint did not allege that he personally engaged in any sort of protected activity. Instead, Thompson's retaliation claim is that he was punished for a discrimination complaint brought by his then-fiancée. The district court reviewed the statutory text and held that, "under its plain language, the statute does not authorize a retaliation claim by a plaintiff who did not himself engage in protected activity." We agree.

Previously, our only discussion of a similar issue had been limited to the dicta in *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir.1993), and *Bell v. Safety Grooving & Grinding, L.P.*, 107 Fed.Appx. 607 (6th Cir.2004) (unpublished).[2] However, neither of these cases resolved the present question. In Ohio Edison, we held that an employee may engage vicariously in protected activity by and through the actions of his agent, and, in Bell, we held that the plaintiff's non-specific complaints to management were insufficient to trigger protection for him in connection with his girlfriend's EEOC discrimination charge.

Although we have not addressed directly the precise issue at hand, the Third, Fifth, and Eighth Circuit Courts of Appeal have unanimously rejected such third-party retaliation claims.

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[2] Unpublished opinions of this court are not precedentially binding under the doctrine of stare decisis. *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir.2007).

In *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir.1996), a former employee claimed that he was fired because his wife, who worked for the same company, filed a complaint under the Age Discrimination in Employment Act ("ADEA").[3] The plaintiff in *Holt* relied upon *De Medina v. Reinhardt*, 444 F.Supp. 573 (D.D.C.1978), in support of his position that protecting one spouse from retaliation for the other spouse's protected complaint was necessary to preserve the intent of Congress. *Holt*, 89 F.3d at 1226. The Court of Appeals for the Fifth Circuit rejected this argument, reasoning that while such a holding "might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities," it would "contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation." *Id.* at 1226.

The *Holt* court "recognize[d] that there is a possible risk that an employer will discriminate against a complaining employee's relative or friend in retaliation for the complaining employee's actions," but concluded that "the language that Congress has employed in [the ADEA] will better protect employees against retaliation than we could by trying to define

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[3] The test for retaliation under the ADEA is the same as the test for Title VII retaliation. *Compare Shirley v. Chrysler First, Inc.*, 970 F.2d 39, 42 (5th Cir.1992) (elements of ADEA retaliation claim) *with Ohio Edison*, 7 F.3d at 543 (elements of Title VII retaliation claim); *see also* 29 U.S.C. § 623(d).

the types of relationships that should render automatic standing under [the ADEA]." *Id.* at 1227. The court noted that the plain language of the statute will protect most close relationships because

> [i]n most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination. The plain language of [the ADEA] will protect these employees from retaliation for their protected activities. However, when an individual, spouse or otherwise, has not participated "in any manner" in conduct that is protected by the ADEA, we hold that he does not have automatic standing to sue for retaliation under [the ADEA] simply because his spouse has engaged in protected activity.

Id. (footnote omitted).[4]

In Holt's case, the evidence did not establish that he participated in his wife's protected activities or that he opposed his employer's alleged discriminatory practice. *Holt*, 89 F.3d at 1227. "At best, [Holt] was a passive observer of [his wife's] protected activities." *Id.* The Fifth Circuit therefore concluded that he was not entitled to sue for retaliation under the ADEA. *Id.*

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[4] To the extent that the *Holt* court characterized the viability of the plaintiff's claim as an issue of "standing," rather than whether the prima facie elements of a cause of action had been established, we disagree with its analysis. *See* text at note 1, *supra*; *Holt*, 89 F.3d at 1228-30 (Dennis, J., dissenting).

The Eighth Circuit employed a similar rationale in *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir.1998). The plaintiff in *Smith* alleged that he was discharged in retaliation for the filing of a discrimination charge by a female employee who lived with him. He argued in pertinent part that he was not required to show that he personally engaged in protected activity in order to establish a prima facie case of retaliation under Title VII and urged the court to expand the protection of the statute "to prohibit employers from taking adverse action against employees whose spouses or significant others have engaged in statutorily protected activity against the employer." *Id.* at 819. The court rejected such a construction, concluding that it "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation." *Id.* (citing *Holt*, 89 F.3d at 1226-27). "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for 'assist[ing] or participat[ing] in any manner' in a proceeding under Title VII. Accordingly, we hold that a plaintiff bringing a retaliation claim under Title VII *must establish that [the personally engaged in the protected conduct.*" *Id.* (emphasis added).

In *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561 (3d Cir.2002), the Court of Appeals for the Third Circuit addressed the issue of third-party retaliation in comparable circumstances. The plaintiff sued under the Americans with Disabilities Act ("ADA"),

the ADEA, and a Pennsylvania statute, alleging that he was fired in retaliation for his father's discrimination complaint filed against their joint employer. As a preliminary matter, the *Fogleman* court noted that the anti-retaliation provisions of the ADA and the ADEA are nearly identical to each other and to the anti-retaliation provision of Title VII. *Id.* at 567 (citing *Krouse v. Am. Sterilizer Co.,* 126 F.3d 494, 500 (3d Cir.1997)). Thus, the "precedent interpreting any one of these statutes is equally relevant to interpretation of the others." *Id.* The *Fogleman* court emphatically rejected the notion of ambiguity:

> The plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity: Each statute forbids discrimination against an individual because "such individual" has engaged in protected conduct. By their own terms, then, the statutes do not make actionable discrimination against an employee who has not engaged in protected activity. Read literally, the statutes are unambiguous – indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity.

Id. at 568.[5]

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[5] The EEOC filed an amicus brief in *Fogleman* and unsuccessfully raised the same arguments before the Third

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The Third Circuit conceded that the case "presents a conflict between a statute's plain meaning and its general policy objectives," but held that when presented with such a conflict, respect for the constitutional separation of powers required it to implement the statutory text. *Id.* at 569. The court also rejected the notion that enforcement of the plain meaning of the statute would lead to dire results and, in fact, stated that there "are at least plausible policy reasons why Congress might have intended to exclude third-party retaliation claims." *Id.* For instance, Congress may have thought that friends or relatives who would be at risk of retaliation typically would have participated in some manner in the protected discrimination charge. *Id.* "If this is true, then the occurrence of pure third-party retaliation will be rare, so that not allowing claims to proceed in these few instances would not necessarily 'defeat the plain purpose' of the anti-discrimination laws." *Id.* (quoting *Bob Jones Univ. v. United States,* 461 U.S. 574, 586, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983)). Congress also may have feared that allowing third-party retaliation claims would "open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees." *Id.* at 570.

Circuit that it makes in the present case. *See* Brief of the EEOC as Amicus Curiae in Support of the Appellant, *Fogleman v. Mercy Hosp.*, 283 F.3d 561 (3d Cir.2002) (No. 00-2263), *available at* 2001 WL 34119171.

In sum, no circuit court of appeals has held that Title VII creates a claim for third-party retaliation in circumstances where the plaintiff has not engaged personally in any protected activity. Although plaintiff and the EEOC argue that the language of § 704(a) is ambiguous and that enforcement of the statutory text will lead to absurd results, we disagree, as do the Third, Fifth, and Eighth Circuits, which have soundly rejected such a cause of action.[6]

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[6] *See also Rainer v. Refco, Inc.*, 464 F.Supp.2d 742 (S.D.Ohio 2006) (holding that the plaintiff employee's Title VII retaliation claim was not cognizable where he did not allege that he engaged in protected activity, but rather claimed that he was terminated because his co-worker mother opposed what she believed to be unlawful sex discrimination in employment); *Singh v. Green Thumb Landscaping, Inc.*, 390 F.Supp.2d 1129 (M.D.Fl.2005) (holding that a former employee did not have a cause of action for alleged retaliation under Title VII based solely on his close association with his co-worker wife who engaged in protected activity); *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 241 F.Supp.2d 1123 (D.Kan.2002) (rejecting third-party retaliation claim under Title VII where the plaintiff alleged that the defendant retaliated against him based on the protected activity of his family members). *But see Gonzalez v. New York State Dept. of Corr. Servs.*, 122 F.Supp.2d 335, 346-47 (N.D.N.Y.2000) (permitting third-party Title VII retaliation claim by employee who alleged that she suffered adverse employment action because of her husband's complaints of discrimination against common employer); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206 (E.D.Cal.1998) (holding that the plaintiff's claim that his former employer refused to rehire him in retaliation for discrimination charge filed by the employee's sister was actionable under Title VII's anti-retaliation provision); *De Medina*, 444 F.Supp. 573 (holding

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V.

A.

The Supreme Court's recent decisions addressing retaliation claims do not require that we alter our analysis or change our conclusion. In *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, ___ U.S. ___, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009), the Court held that the protection of the opposition clause of § 704(a) extends to an employee who was terminated after she testified involuntarily in an internal investigation of alleged sexual harassment. The plaintiff "did 'not claim to have instigated or initiated any complaint prior to her participation in the investigation, nor did she take any further action following the investigation and prior to her firing.'" 129 S.Ct. at 850 (quoting *Crawford v. Metro. Gov't of Nashville and Davidson County, Tenn.*, 211 Fed.Appx. 373, 376 (6th Cir.2006)). Rather, she simply cooperated in the investigation, responded to questions posed by her employer and, in doing so, testified unfavorably against a supervisor who was the subject of the investigation triggered by another coworker's complaints.

The Court abrogated this Circuit's view that the opposition clause "'demands active, consistent "opposing" activities to warrant . . . protection against retaliation'" and that an employee must "instigat[e]

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that Title VII prohibited retaliation against the plaintiff employee in reprisal for the protected activities of her spouse).

or initiat[e]" a complaint to be protected under § 704(a). *Id.* at 851 (quoting *Crawford,* 211 Fed.Appx. at 376 (citation and internal quotation marks omitted)). Instead, the Court held that in this context, the "ordinary meaning" of the undefined statutory term "oppose" should be utilized, which includes the definitions "confront[ing]," "resist[ing]," and "withstand[ing]" discriminatory conduct; or, "to be hostile or adverse to, as in opinion." *Id.* (quoting Webster's New International Dictionary 1710 (2d ed.1958)) and Random House Dictionary of the English Language 1359 (2d ed.1987). The Court explained:

> "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. . . . There is . . . no reason to doubt that a person can "oppose" by responding to someone else's questions just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.

Id. at 851. The Court concluded that:

> [t]he statement Crawford says she gave to [her employer] is thus covered by the opposition clause, as an ostensibly disapproving account of sexually obnoxious

> behavior toward her by a fellow employee, an answer she says antagonized her employer to the point of sacking her on a false pretense. Crawford's description of the louche goings-on would certainly qualify in the minds of reasonable jurors as "resist[ant]" or "antagoni[stic]" to [the supervisor's] treatment, if for no other reason than the point argued by the Government and explained by an EEOC guideline: "When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication" virtually always "constitutes the employee's *opposition* to the activity." Brief for United States as *Amicus Curiae* 9 (citing 2 EEOC Compliance Manual §§ 8-II-B(1), (2), p. 614:0003 (Mar.2003)); see also *Fed. Express Corp. v. Holowecki*, ___ U.S. ___, 128 S.Ct. 1147, 170 L.Ed.2d 10 (2008) (explaining that EEOC compliance manuals "reflect 'a body of experience and informed judgment to which courts and litigants may properly resort for guidance'") (quoting *Bragdon v. Abbott*, 524 U.S. 624, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998)).

Id. at 850-51.

The Court reasoned that to limit the protection of § 704(a) to "active, consistent" behavior would undermine the primary objective of the statute of avoiding harm to employees, because "[i]f it were clear law that an employee who reported discrimination in answering an employer's questions could be penalized

with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others." *Id.* at 852.

However, *Crawford*'s reach does not extend to the present circumstances. As Justice Alito accurately noted in his concurring opinion in *Crawford,* "[t]he question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case." *Crawford,* 129 S.Ct. at 855 (Alito, J., concurring). As he further opined, to extend the Court's holding beyond employees who testify in internal investigations or engage in analogous purposive conduct "would have important practical implications" and "would open the door to retaliation claims by employees who never expressed a word of opposition to their employers" – exactly the conundrum presented in the instant case. *Id.* at 854.

Indeed, the present factual circumstances are even further removed from *Crawford.* As we have emphasized, Thompson does not allege in his complaint that he *personally* engaged in *any* statutorily protected activity or "opposition" to discrimination.[7]

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[7] In dissent, Judge Moore advocates an issue that has not been pled, argued, or presented. She contends that, despite plaintiff's admissions to the contrary, had plaintiff anticipated the Supreme Court's *Crawford* decision, he may have pled, argued, and appealed an issue regarding his alleged personal protected activity. However, plaintiff has forfeited the issue. The sole question raised and decided in the vacated panel opinion signed by Judge Moore for which rehearing en banc was granted

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Moreover, as Judge Moore concedes in her dissent, "[i]t does not appear that Thompson himself informed any of his supervisors that he aided Regalado with filing her complaint." (Moore, J., dissenting, p. 823 n. 7).[8] Thus, even in the wake of *Crawford,* Thompson has failed to raise a genuine issue of material fact that he engaged in protected activity by personally "opposing" a discriminatory practice under Title VII's anti-retaliation provision.

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is "[w]hether § 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), prohibits an employer from terminating an individual in retaliation for the protected activity of his fiancee who also works for the employer." (Plaintiff-Appellant's Brief, "Statement of the Issue."). In the panel opinion, Judge Moore and Judge Tarnow framed the issue and their holding as follows:

> We are asked whether section 704(a)'s protections extend to persons not expressly described in the statute. Specifically, does Title VII prohibit employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action? As such conduct would undermine the purposes of Title VII, we hold that such retaliatory action is prohibited.

Thompson v. North Am. Stainless, LP, 520 F.3d 644, 646 (6th Cir.2007), reh'g en banc granted, opinion vacated (July 28, 2008).

[8] As we have noted, an essential element of a prima facie case of retaliation is that the plaintiff's exercise of his protected rights was known to the defendant in order to establish the requisite causal connection between the opposition and the adverse action at issue. *Martin,* 548 F.3d at 412.

B.

In *Burlington Northern & Santa Fe Ry. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), the Court settled a circuit court split regarding the scope of Title VII's anti-retaliation provision, specifically, the reach of its phrase "discriminate against": "Does that provision confine actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?" *Burlington Northern,* 548 U.S. at 57, 126 S.Ct. 2405. The Court answered these questions as follows:

> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.

Id.

In *Burlington Northern,* the petitioner-employer suspended an employee without pay for insubordination, but later rescinded the suspension and awarded her back pay. The employee alleged that the

employer's actions were in retaliation for her complaints about gender discrimination in the workplace. Noting that Title VII's substantive provision, § 703(a), protects an individual only from employment-related discrimination, the employer argued that § 704(a) should be read *in para materia* with § 703(a) to similarly require a link between the challenged retaliatory action and the terms, conditions, or status of employment. *Id.* at 61, 126 S.Ct. 2405.

In rejecting the employer's contention, the Court scrutinized carefully the statutory language of the two provisions and found that they differed in significant respects. *Id.* Unlike § 703(a), the anti-retaliation provision does not contain words limiting its scope to actions that affect employment or alter the conditions of the workplace. *Id.* at 62., 126 S.Ct. 2405 Applying statutory construction principles, the Court presumed that "where words differ as they differ here, 'Congress acts intentionally and purposely in the disparate inclusion or exclusion,'" *id.* at 63, 126 S.Ct. 2405 (quoting *Russello v. United States,* 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)), and therefore concluded that the substantive and anti-retaliation provisions are not coterminous:

> [T]he two provisions differ not only in language but in purpose as well. The anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status. The

> anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, *i.e.*, their status. The anti-retaliation provision seeks to prevent harm to individuals based on what they do, *i.e.*, their conduct.
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> * * *
>
> [O]ne cannot secure the second objective by focusing only upon employer actions and harm that concern employment and the workplace. Were all such actions and harms eliminated, the anti-retaliation provision's objective would *not* be achieved. An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace. A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's "primary purpose," namely, "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346, 117 S.Ct. 843.

Id. at 63-64, 126 S.Ct. 2405 (internal citations omitted).

The Court concluded that "purpose reinforces what language already indicates, namely, that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." *Id.* at 64, 126 S.Ct. 2405.

Thompson argues that, in light of the Court's determination in *Burlington Northern* that the phrase "discriminated against" should be generously interpreted to preserve "unfettered access to [Title VII's] statutory remedial mechanisms," *id.* at 64, 126 S.Ct. 2405, the statutory language at issue in the present case also should be construed broadly, for the same reason. Thompson asserts that if we engage in a restrictive literal reading of § 704(a) and require that the person filing the retaliation claim be the same person who either engaged in or assisted in the protected activity, this narrow construction will defy the statute's purpose and deter individuals from exercising their protected rights. We disagree.

First, we state the obvious – the Court in *Burlington Northern* addressed the scope of actionable retaliation committed by the employer under § 704(a), an issue that is separate and distinct from whether § 704(a) permits an employee who did not himself engage in protected activity to bring a retaliation claim and that requires interpretation of

entirely different language.[9] Moreover, in concluding that § 704(a) does not confine retaliatory acts to those related to employment or the workplace, the Court noted that "no such limiting words" appear in the statute and thus declined to incorporate restrictions *not expressly set forth* in the plain language of the text.

The statutory language of § 704(a) pertinent to the present case is not silent regarding who falls under the umbrella of its protection. It explicitly identifies those individuals who are protected-employees who "opposed any practice made an unlawful employment practice" or who "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing" under Title VII. Section 704(a) thus clearly limits the class of claimants to those who actually engaged in the protected activity.

As the Court concluded in *Burlington Northern*, unlike Title VII's substantive provision that bars employment based on an individual's *status* as a member of a protected class, "the anti-retaliation

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[9] Two other recent Supreme Court decisions, *CBOCS West, Inc. v. Humphries*, ___ U.S. ___, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008), and *Gomez-Perez v. Potter*, ___ U.S. ___, 128 S.Ct. 1931, 170 L.Ed.2d 887 (2008), upheld retaliation claims brought under entirely different statutes (42 U.S.C. § 1981(a) and 29 U.S.C. § 633a(a), respectively) and rested upon the interpretation of specific statutory language authorizing the suits. These cases do not compel a contrary resolution of the narrow unrelated issue presented in Thompson's appeal.

provision seeks to prevent harm to individuals based on *what they do, i.e., their conduct*." *Burlington Northern*, 548 U.S. at 63, 126 S.Ct. 2405 (emphasis added). In other words, Congress carefully chose qualifying words of *action* ("opposed," "testified," "made a charge," "participated," "assisted"), not words of *association*. Even under the most generous definition of "oppose" recognized by the Court in *Crawford* – "to be hostile or adverse to, as in opinion" – a plaintiff must engage in a discrete, identifiable, and purposive act of opposition to discrimination. *Crawford*, 129 S.Ct. at 850. Thus, such action is a critical component of a prima facie case of retaliation under Title VII. The plain text simply cannot be read to encompass "piggyback" protection of employees like Thompson who, by his own admission, did not engage in protected activity, but who is merely associated with another employee who did oppose an alleged unlawful employment practice.

C.

We must look to what Congress actually enacted, not what we believe Congress might have passed were it confronted with the facts at bar. For the reasons we have laid out, it was not "absurd" for Congress to limit the class of persons who are entitled to sue to employees who personally opposed a practice, made a charge, assisted, or participated in an investigation. Our interpretation does not undermine the anti-retaliation provision's purpose because retaliation is still actionable, but only in a suit by a

primary actor who engaged in protected activity and not by a passive bystander.[10]

VI.

For these reasons, we affirm the judgment of the district court and hold that § 704(a) of Title VII does not create a cause of action for third-party retaliation for persons who have not personally engaged in protected activity.

ROGERS, Circuit Judge, concurring.

I concur in the result but my reasoning differs somewhat from that of the majority.

In my view, "discrimination against" an employee may include hurting that employee's relative or friend, and imposing such a hurt would be unlawful if it is imposed "because [the employee] has opposed any practice made an unlawful employment practice by this subchapter, or because [the employee] has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or

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[10] All of the parties in this case agreed at oral argument that if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to § 704(a) and, under *Burlington Northern*, defendant's termination of Thompson potentially could be deemed an "adverse employment action" against her.

hearing under this subchapter." 42 U.S.C. § 2000e-3(a). At the very least, a contrary reading is neither plain, nor unambiguous. Indeed, as the majority recognizes, "[a]ll of the parties in this case agreed at oral argument that if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to § 704(a) and, under *Burlington Northern [& Santa Fe Railway. Co. v. White,* 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006)], defendant's termination of Thompson potentially could be deemed an 'adverse employment action' against her." Maj. op. at 816 n. 10. Such a conclusion would *require* that the retaliatory termination of Thompson was "unlawful" under § 2000e-3(a).

In other words, § 2000e-3(a) dictates what practices amount to unlawful retaliation, not who may sue. And when the person bringing suit is the employee who has sufficiently opposed an unlawful employment practice, § 2000e-3(a) may well render unlawful the firing of the employee's spouse.

The question of who may sue is simply not addressed by § 2000e-3(a). Rather, the procedural provisions of Title VII provide that "person[s] claiming to be aggrieved" and "person[s] aggrieved" may sue for Title VII violations. §§ 2000e-5(b), -5(e)(1). While these terms should be interpreted broadly, they should not be interpreted to extend to

every person who has something to gain by challenging the employer's unlawful action.[1] If

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[1] Language in cases like *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir.1976), and *EEOC v. Bailey Co.*, 563 F.2d 439 (6th Cir.1977), that standing under Title VII was intended to be as broad as Article III permits, must be taken in context.

Senter involved a challenge to standing to maintain a class action, and we explicitly refrained from reaching a third-party standing issue by noting "that the interests asserted by Appellant in his complaint unquestionably fall within the parameters of Title VII." 532 F.2d at 517 n. 6.

Bailey Co. dealt with whether a white woman could challenge her employer's discrimination against blacks. 563 F.2d at 442. We held that she could, not because a person unprotected by Title VII could sue, but because a white woman was protected by virtue of her interest in an integrated workplace. *Id.* at 452. This conclusion was supported by the Supreme Court's *Trafficante* decision, which held that a white tenant had standing to challenge discrimination against blacks by an apartment complex. *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d 415 (1972). Indeed, we stated that were it not for *Trafficante*, we would be inclined to hold that the plaintiff lacked standing. *Bailey Co.*, 563 F.2d at 452. As one reason for saying *Trafficante* made a difference, we noted that "the EEOC has interpreted Title VII to confer upon every employee the right to a working environment free from unlawful employment discrimination. Under the EEOC's interpretation of Title VII, whites are aggrieved by discrimination against blacks at their place of employment and have standing to file charges with the EEOC and sue in court." *Id.* at 454. Neither *Bailey Co.* nor *Trafficante* can properly be read to say that any person affected by the imposition of retaliation should be deemed sufficiently aggrieved to bring a Title VII claim. While Title VII can be interpreted to protect the right of people to associate with people of different races, it can hardly be interpreted to protect the right of people to associate with people who have been retaliated against.

interpreted that broadly, all sorts of persons who are not the intended beneficiaries of Title VII's protections could sue. For instance, someone interested in the financial health of a company (such as a shareholder or partner) could challenge the firing of a particularly productive employee. Or a dismissed employee's creditor could challenge the dismissal even when the employee does not want to. To avoid such results obviously not intended by Congress, "persons aggrieved" must be interpreted to include those persons who are the intended beneficiaries of the protection enacted in the substantive provision. *See Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004).

The intended beneficiaries of the anti-retaliation provision of § 2000e-3(a) are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation. It follows that in the retaliation context "persons aggrieved" must be interpreted to be the persons retaliated against. While that might not be the only interpretation of "person aggrieved," it is doubtless the best interpretation. The person bringing the claim to the EEOC, and subsequently to court, should be the person alleging that the harm was directed at him or her. That will focus the inquiry where it belongs: on the allegedly unlawful aspect of the employer's retaliatory action, and the extent to which the action is directed against (and harmful to) the protected person.

The reasoning and precedent relied upon by the majority in Part IV generally support this conclusion

as well. My difference with the majority is founded on a concern that by relying on the language of the provision stating what is unlawful, rather than on the language of the provision regarding who can sue, the holding may be misinterpreted to preclude Title VII claims by protected persons, like Regalado, for retaliation in the form of harm imposed on people that (the employer knows) the protected persons care about.

BOYCE F. MARTIN, JR., Circuit Judge, dissenting.

I join Judge Moore's dissent in full but write separately to emphasize how misplaced the majority's relentless reliance on "plain meaning" is: its analysis flows entirely from a flawed and unexamined *ipse dixit*.

In an approach that can hardly be described as exegetical, the majority declares that the meaning of "oppose" – an undefined term in section 704(a), *see* 42 U.S.C.2000e-3(a) – is "plain and unambiguous," Maj. Op. at 805. Sometimes, of course, the meaning of a statutory term is plain. In those cases, a detailed discussion of the text and underlying Congressional purpose would only cloud the statute's clear dictates. But that is not so here, and the majority fails to recognize that the meaning of "oppose" in section 704(a) is broader than it thinks and, at minimum, ambiguous.

But don't take my word for it. The Supreme Court recently told us so in *Crawford v. Metropolitan Government of Nashville*, ___ U.S. ___, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009). There, the Court reversed one of our prior decisions which had held – under the same uncritical "plain meaning" approach used by today's majority – that "oppose" encompasses only the performance of certain activities. In correcting this Court's misguided interpretation, *Crawford* reinforced a broad reading of "oppose" in several key respects. First, it rejected a definition of "oppose" that included only "active, consistent 'opposing' activities" – the Court referred to such a rule as "freakish." *Id.* at 851. Second, in listing dictionary definitions, the Court included one that defined "oppose" as "to be hostile or adverse to, *as in opinion*." *Id.* at 850 (quoting Random House Dictionary of the English Language 1359 (2d ed.1987)) (emphasis added). Third, and most importantly, the Court stated:

> "Oppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to "oppose" slavery before Emancipation, or are said to "oppose" capital punishment today, *without* writing public letters, taking to the streets, or resisting the government.

Crawford, 129 S.Ct. at 851 (emphasis added). In other words, "oppose," in common everyday usage ("plain meaning"?), includes the silent opposition of

everything from gay marriage to the death penalty, without requiring anyone to shout it from the rooftops. *Crawford* thus drastically undercut the majority's tunnel vision view that this case concerns only a straightforward debate about whether clear statutory text controls over some unexpressed Congressional purpose. See Maj. Op. at 811. Were it so simple.

Aside from ruling that Thompson is not personally covered by the statute (more on that later), the majority claims that Thompson "forfeited" the issue. Maj. Op. at 813 n. 7. Yet it misunderstands forfeiture's significance. A plaintiff cannot forfeit a statute's inherent ambiguity; the meaning of "oppose" is not "plain" and Thompson cannot make it so via forfeiture. And make no mistake, the majority does not say that Thompson has forfeited his right to make this argument and therefore the issue remains open to be decided in some future case (as would be proper). Instead it invokes forfeiture but nevertheless *decides the question*. *See* Maj. Op. at 814 ("[E]ven in the wake of *Crawford,* Thompson has failed to raise a genuine issue of material fact that he engaged in protected activity[.]"). If the majority wants to decide this question (it clearly does), it may not hide behind a purported forfeiture to deflect contrary arguments while doing so. The majority accuses the dissents of "advocat[ing] an issue that has not been plead,

argued, or presented." Maj. Op. at 813 n. 7. Maybe so, but that's only because the majority decides one.[1]

Furthermore, in concluding that "oppose" does not encompass Thompson's conduct, the majority purports to agree with Justice Alito's concurring opinion in *Crawford.* Maj. Op. at 813. Yet the majority's reasoning, already at odds with the *Crawford* majority's reasoning, is also inconsistent with Justice Alito's. Specifically, Justice Alito, joined by Justice Thomas, expressed doubt about whether "oppose" should be interpreted to cover what he called "silent opposition." *Crawford,* 129 S.Ct. at 854 (Alito, J., concurring). But he did so not because he thought "oppose" explicitly barred that result – as the majority asserts today – but instead because of that interpretation's potentially "important *practical* implications." *Id.* at 854 (Alito, J., concurring) (emphasis added) (citing the possibility of litigation "by employees who never expressed a word of opposition to their employers," though observing that "in many cases, such employees would not be able to show that management was aware of their opposition and thus would not be able to show that their opposition caused the adverse actions at issue").

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[1] On the other hand, if the majority's forfeiture point is to be believed, then future courts and litigants should treat the majority's discussion of the scope of "oppose" and the impact of *Crawford* as mere dicta and the issue open going forward.

Indeed, at no point in Justice Alito's concurrence did he invoke that interpretive bogeyman, "plain meaning"; in fact he conceded that the meaning of "oppose" is not plain: "The question whether the opposition clause shields employees who do not communicate their views to their employers through purposive conduct is not before us in this case; *the answer to that question is far from clear;* and I do not understand the Court's holding to reach that issue here." *Id.* at 854-55 (Alito, J., concurring) (emphasis added). The majority pretends that this statement somehow supports its view that the statute is "plain and unambiguous." Maj. Op. at 813-14. In any event, regardless of how it has been presented so far, our Court cannot decide this question by invoking "plain meaning" unless "oppose" actually is "plain."

So, because the meaning of "oppose" is ambiguous, determining whether plaintiffs like Thompson should be allowed to sue ought to depend on how much weight Congress would have given the "important practical implications" Justice Alito and Judge Moore identify, which the majority ignores. Based on the text, structure, history, and Congressional purpose, I would hold these claims cognizable: I cannot conceive that Congress wanted to categorically bar them through the ambiguous, undefined term "oppose." This is not a case about abstract third-party claims; it is about an employee who was fired because, he says, the company retaliated against him for his opposition to an unlawful employment practice.

That said, this does not mean Thompson automatically wins. We do not know whether he could meet his evidentiary burden, though I am certain he should be given the opportunity to try to prove that his employer knew of his unexpressed opposition and fired him for that reason. Today, however, the majority sidesteps the traditional framework – which includes causation and discriminatory intent requirements – for deciding discrimination claims, *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973); *Crawford v. TRW Auto. U.S.*, 560 F.3d 607, 612 (6th Cir.2009), and replaces it with a complete, indiscriminate bar on valid and invalid claims alike on the basis of textual analysis that fails to analyze the text.

I respectfully dissent.

KAREN NELSON MOORE, Circuit Judge, dissenting.

I am baffled by the majority opinion's downplaying of important Supreme Court precedent in this arena. Both long-standing Supreme Court decisions and more recent pronouncements by the Court support a reading of § 704(a) of Title VII, 42 U.S.C. 2000e-3(a),[1] that encompasses Thompson's claim.

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[1] Section 704(a) states in pertinent part that:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees

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Older Supreme Court cases, such as *Bob Jones University v. United States*, 461 U.S. 574, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), highlight the primacy of statutory purpose, while more recent decisions, such as *Crawford v. Metropolitan Government of Nashville*, ___ U.S. ___, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009), demonstrate the Court's belief that a broad approach should apply in interpreting statutes meant to protect employees against employer retaliation for protected activity. These cases reinforce the correctness of the panel majority's approach in this case. Moreover, even under the approach advocated by the concurrence, Thompson may sue under § 704(a). Therefore, and for the reasons stated below, I respectfully dissent.

I. *Bob Jones University v. United States* and other Long-Standing Supreme Court Precedent

The majority contends that "the text of § 704(a) is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation," and that we are precluded from considering whether application of the plain language of the statute "would create an 'absurd' result." Majority Op. at 807. As the vacated panel majority opinion properly held, this assertion is incorrect.

. . . because he has opposed any practice made an unlawful employment practice by this subchapter. . . .

42 U.S.C.2000e-3(a).

"The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). Furthermore, whether a statute is plain and unambiguous must be determined "with regard to the particular dispute in the case." *Id.* at 340, 117 S.Ct. 843. Moreover, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones*, 461 U.S. at 586, 103 S.Ct. 2017.

The Supreme Court has noted that the "'primary purpose'" of § 704(a) is "'[m]aintaining unfettered access to statutory remedial mechanisms.'" *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006) (quoting *Robinson*, 519 U.S. at 346, 117 S.Ct. 843). Clearly, the majority's narrow interpretation of § 704(a) squarely contradicts this purpose. *Cf. Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir.2002) ("Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace."). However, rather than analyzing this issue directly, the majority implies that these cases are "'rare, so

that not allowing claims to proceed in these few instances would not necessarily defeat the plain purpose of the antidiscrimination laws.'" Majority Op. at 812 (second set of internal quotation marks omitted) (quoting *Fogleman*, 283 F.3d at 569). Neither the majority nor *Fogleman* cites any authority for this sweeping assertion, thus demanding that the reader accept this claim based on nothing more than blind faith. I am not prepared to make such a leap.[2]

Because the majority's plain-language interpretation of the statute defeats the Congressional purpose, it is proper to consider sources beyond the text to determine the correct interpretation of § 704(a). *Bob Jones*, 461 U.S. at 586, 103 S.Ct. 2017. This is the reality that the vacated panel majority opinion recognized, and I fully agree with both the conclusion reached in that opinion and the approach utilized therein. Clearly, the purpose behind the statute provides the best guide as to how the statute should be interpreted. Thus, I believe that § 704(a) should be interpreted broadly to allow for "unfettered access to statutory remedial mechanisms.'" *Burlington*, 548 U.S. at 64, 126 S.Ct. 2405 (quoting *Robinson*, 519 U.S. at 346, 117 S.Ct. 843).[3] Such a

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[2] In fact, not even the Fogleman panel found this rationale persuasive. Fogleman, 283 F.3d at 569 (noting that it did not find this asserted reason to restrict § 704(a) "particularly convincing").

[3] I am not the first in our circuit to take such an approach to interpreting antiretaliation provisions.

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broad interpretation demands that third parties such as Thompson be given the opportunity to bring a § 704(a) retaliation claim for the harm visited upon them in retaliation for protected actions undertaken by close associates.[4] If Thompson cannot bring this

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> In *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir.1993), a panel of this court noted that courts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear purpose in proscribing retaliatory activity. Contrary to defendant's assertions, courts have frequently applied the retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy behind the statute supports a non-exclusive reading of the statutory language.

Id. at 545.

[4] Further support for this position is found in the EEOC Compliance Manual, which states that "'Title VII . . . prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights.'" 2 EEOC Compliance Manual § 8.II(B)(3)(c), 614.0005 (BNA 2003), *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 580 (6th Cir.2000). The Supreme Court has relied on the EEOC Manual in several decisions interpreting § 704(a). *See Burlington*, 548 U.S. at 65-66, 126 S.Ct. 2405; *Robinson*, 519 U.S. at 345-46, 117 S.Ct. 843; *see also Crawford*, 129 S.Ct. at 851 (referencing the EEOC Compliance Manual). Although not controlling, this manual "do[es] constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (internal quotation marks omitted); *see also Crawford*, 129 S.Ct. at 851 (same).

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action, then he has no recourse for the harm that North American Stainless has caused him by retaliating through Thompson against Thompson's then fiancee/now wife Miriam Regalado for Regalado's protected activity of filing a Title VII discrimination claim.[5] Under the majority's view, employers can use

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The Compliance Manual further notes that "[r]etaliation against a close relative of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees." 2 EEOC Compliance Manual § 8.II(B)(3)(c). This statement suggests that the EEOC may view North American Stainless's action of firing Thompson as retaliation against Thompson for Regalado's filing of a discrimination charge. Thus, the Compliance Manual provides yet another light in which to view Thompson's claim that renders the claim meritorious. *See also* 2 EEOC Compliance Manual § 8.II(C)(3) ("The retaliation provision[] of Title VII . . . prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights. For example, it would be unlawful for a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge. Both spouses, in such circumstances, could bring retaliation claims." (footnote omitted citing *Ohio Edison Co.*, 7 F.3d at 544)).

[5] The majority attempts to alleviate this concern by noting that "if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to § 704(a)." Majority Op. at 816 & n. 10. However, Regalado's ability to sue in this matter does not solve the instant problem because the relief Regalado would be able to seek would appear to differ substantially from the relief that Thompson can seek. Specifically, it is unclear whether Regalado would be able to sue to have Thompson reinstated. Thus, Regalado's suit might not completely remedy Thompson's harm. Therefore, contrary to the

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Thompson, and others like him, as swords to keep employees from invoking their statutory rights with no redress for the harms suffered by those individuals. *Cf. Fogleman*, 283 F.3d at 569 ("To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." (internal quotation marks omitted)). Clearly, this was not Congress's intent in passing Title VII, *see Burlington*, 548 U.S. at 64, 126 S.Ct. 2405, and I cannot support such a construction of § 704(a).[6]

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majority's assertion, the fact that Regalado can sue does not prevent the majority's interpretation from undermining the purpose behind the antiretaliation provision.

[6] Contrary to the majority's assertion that "no circuit court of appeals has held that Title VII creates a claim for third-party retaliation," Majority Op. at 811, two other circuits have recognized the need to interpret § 704(a) broadly to include third-party retaliation claims, *see Wu v. Thomas*, 863 F.2d 1543, 1547-48 (11th Cir.1989) (allowing a husband's claim – that the university employing a couple engaged in retaliatory conduct towards the husband in retaliation for his wife's filing of an EEOC sex-discrimination charge – to proceed as a "wrongful retaliatory conduct" claim); *McDonnell v. Cisneros*, 84 F.3d 256, 262 (7th Cir.1996) (citing *Wu* with approval and noting the need to read § 704(a) broadly to ensure that its purpose is satisfied) (Posner, C.J.). Moreover, we have previously noted, albeit in dicta, that "a plaintiff's allegation of reprisal for a relative's antidiscrimination activities states a claim upon which relief can be granted under Title VII." *Ohio Edison Co.*, 7 F.3d at 544 (adopting the view espoused in *DeMedina v. Reinhardt*, 444 F.Supp. 573 (D.D.C.1978), *aff'd in part and remanded in part*, 686 F.2d 997 (D.C.Cir.1982)).

II. *Crawford v. Metropolitan Government of Nashville and Recent Supreme Court Decisions*

The Supreme Court has recently emphasized the need to interpret protective statutes, including § 704(a), in a broad manner in order to ensure that the purposes behind these statutes are satisfied. The most recent of these pronouncements came in *Crawford v. Metropolitan Government of Nashville*, a case that originated from our circuit and that involves an employee who was fired after she participated in an internal investigation into harassment. *Crawford* concerns the scope of the "opposition clause" of § 704(a). *Crawford*, 129 S.Ct. at 850 ("The opposition clause makes it 'unlawful . . . for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made . . . unlawful . . . by this subchapter.' § 2000e-3(a)."). A panel of this circuit had held that the opposition clause "'demands active, consistent "opposing" activities to warrant . . . protection against retaliation.'" *Crawford v. Metro. Gov't of Nashville*, 211 Fed.Appx. 373, 376 (6th Cir.2006) (unpublished opinion) (omission in original) (quoting *Bell v. Safety Grooving & Grinding, LP*, 107 Fed.Appx. 607, 610 (6th Cir.2004) (unpublished opinion)). The Supreme Court rejected this narrow definition of "oppose," calling such an interpretation "freakish," and embraced a more expansive "ordinary meaning" of "oppose." *Crawford*, 129 S.Ct. at 850-51. Such an

approach shows the Supreme Court's diligence in guaranteeing that § 704(a)'s purpose is fulfilled.

Besides demonstrating the Court's commitment to interpreting § 704(a) consistent with its purpose, *Crawford* opens the door to § 704(a) claims that are based on a broad definition of "oppose." *Crawford* states that the "ordinary meaning" of "oppose" includes the following Random House Dictionary definition: "'to be hostile or adverse to, *as in opinion.*'" *Crawford,* 129 S.Ct. at 850 (emphasis added). The Supreme Court explained that

> "[o]ppose" goes beyond "active, consistent" behavior in ordinary discourse, where we would naturally use the word to speak of someone who has taken no action at all to advance a position beyond disclosing it. Countless people were known to "oppose" slavery before Emancipation, or are said to "oppose" capital punishment today, *without* writing public letters, taking to the streets, or resisting the government.

Id. at 851 (emphasis added).

The vacated panel majority opinion in *Thompson* did not focus on the definition of "oppose," because the Supreme Court had not yet issued its opinion in *Crawford.* However, now that *Crawford* has expanded the landscape of the opposition clause, it is appropriate to consider whether Thompson has met his burden on summary judgment by raising a genuine issue of material fact as to whether he participated in the type of opposition protected by

Crawford. I believe that Thompson has met this burden.

According to his complaint, Thompson maintained a relationship with Miriam Regalado (engagement and then marriage) during the time in which she claims that she was being discriminated against by North American Stainless. Joint Appendix ("J.A.") at 14 (Compl.¶ 13). Moreover, Thompson aided Regalado in preparing and filing her discrimination complaint and participated in an interview with the EEOC regarding the matter. J.A. at 29-30, 35-36 (Thompson Dep. at 56-57, 80, 85).[7] When "view[ing] the factual evidence and draw[ing] all reasonable inferences in favor of the non-moving party," as we must on summary judgment, it is reasonable to infer that Thompson opposed the discrimination against Regalado. *Nat'l Enters., Inc. v. Smith*, 114 F.3d 561, 563 (6th Cir.1997). Such an inference not only is reasonable, but also is likely the most accurate description of Thompson's involvement. Moreover, it is reasonable to infer that, given North American Stainless's knowledge regarding Regalado and Thompson's intimate relationship, North American Stainless believed that Thompson opposed the discrimination against Regalado and fired Thompson for that opposition. Reading the facts in this light, I

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[7] It does not appear that Thompson himself informed any of his supervisors that he aided Regalado with filing her complaint; however, other coworkers were aware of his assistance. J.A. at 29, 35-37 (Thompson Dep. at 56, 80, 85, 118).

conclude that the district court erred in granting summary judgment against Thompson.

The majority insists that *Crawford* "do[es] not require that [it] alter [its] analysis or change [its] conclusion" in this case, Majority Op. at 812, because "Thompson does not allege in his complaint that he *personally* engaged in *any* statutorily protected activity or 'opposition' to discrimination," Majority Op. at 813-14. While it may be true that Thompson's complaint focuses on North American Stainless's retaliation against Regalado through Thompson, such an approach is not surprising given the state of the law in this circuit during Thompson's district court proceedings. *Crawford* changed that law while Thompson's direct appeal was pending. Thompson should not be punished now because he relied on our prior erroneous and crabbed position. At the very least, Thompson should be given an opportunity to make a *Crawford* "opposition" argument before the district court, giving the district court an opportunity to consider fully the effect of *Crawford* on the actual facts involved in this case. Rather than allow for more consideration of this issue, the majority slams the door on Thompson's claim while paying mere lip service to *Crawford*'s expansive holding. In my view, this is an unacceptable manner in which to treat pertinent Supreme Court precedent that is binding on direct appeal in Thompson's case. Moreover, the Supreme Court's willingness to embrace such an encompassing meaning of "oppose" illustrates the

Court's commitment to ensuring that § 704(a)'s reach is broad enough to effectuate the purpose of Title VII.

Crawford is not the first indication the Court has given that protective statutes such as Title VII should not be read narrowly. Notably, the Supreme Court has recently interpreted several protective statutes broadly to include retaliation claims in order to achieve the purposes of those statutes, even though the texts of those statutes say nothing about retaliation. *See Gomez-Perez v. Potter*, ___ U.S. ___, 128 S.Ct. 1931, 1936, 170 L.Ed.2d 887 (2008) (holding that the phrase "discrimination based on age" in the Age Discrimination in Employment Act, 29 U.S.C. § 633a(a), includes retaliation claims, even though the statute makes no mention of retaliation); *CBOCS West, Inc. v. Humphries*, ___ U.S. ___, 128 S.Ct. 1951, 1954-55, 170 L.Ed.2d 864 (2008) (holding that 42 U.S.C. § 1981 encompasses retaliation claims, even though the statute does not explicitly mention retaliation). Even though these cases do not address § 704(a), they still demonstrate the Supreme Court's dedication to satisfying the purpose of protective statutes, rather than rigid adherence to the text when doing so would not fulfill the clear legislative purpose. Additionally, in both *Crawford* and *Burlington*, the Supreme Court broadly construed language in § 704(a) to increase the number of persons who can bring claims under the statute. Although each of these cases involved slightly different issues than the instant appeal, these decisions further evidence the Supreme Court's

determination that § 704(a) should be interpreted in favor of inclusivity rather than exclusivity. The majority simply brushes these guiding signals aside. I do not believe that these Supreme Court decisions can be so cavalierly dismissed. Given the majority's clear disregard for the purpose of § 704(a) and the guiding principles that the Supreme Court has provided in this area, I must dissent.

III. 42 U.S.C. § 2000e-5 STANDING

The concurrence asserts that § 704(a) "dictates what practices amount to unlawful retaliation, not who may sue." Concurrence at 18. It contends that the proper inquiry in this case is whether Thompson has standing to sue under 42 U.S.C. § 2000e-5. As even the majority recognizes, the concurrence's conclusion that Thompson lacks standing is flawed.

At the outset, the concurrence correctly concedes that North American Stainless committed an unlawful employment act, as defined by the anti-retaliation clause, when it fired Thompson.[8] However, the concurrence then suggests that Thompson lacks standing to bring this claim under 42 U.S.C. § 2000e-5 because Thompson has not been "sufficiently

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[8] As the concurrence correctly notes, such a concession is implicit in the majority's assertion that Regalado could bring a retaliation claim against North American Stainless based on Thompson's firing. Concurrence at 816; *see also* Majority Op. at 816 & n. 10.

aggrieved." Concurrence at 818 n. 1. This latter assertion confuses the harm at issue in the instant case and is in error. Although North American Stainless may have retaliated against Regalado, North American Stainless harmed Thompson in order to effectuate this retaliation. Thompson is thus not asserting Regalado's harm, but rather is seeking redress for the harm done directly to him by North American Stainless.

"Aggrieved" is not defined by Title VII and thus should be given its ordinary meaning. *See Crawford,* 129 S.Ct. at 850 (citing *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979)). According to the Oxford English Dictionary, to be "aggrieved" is to be "[i]njured or wronged in one's rights, relations, or position." Oxford English Dictionary Online, www. dictionary. oed. com (last visited Apri! 20, 2009) (defining "aggrieved"). Applying this definition and assuming, as the concurrence does, that firing Thompson was an unlawful act, it is obvious that Thompson is "a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice." 42 U.S.C.2000e-5(b).

Furthermore, there is no authority to support the concurrence's attempt to narrow the scope of § 2000e-5 to encompass only "those persons who are the intended beneficiaries of the protection enacted in the substantive provision" of Title VII, Concurrence at 817, particularly because the case cited in support of that proposition, *Kowalski v. Tesmer,* 543 U.S. 125,

129, 125 S.Ct. 564, 160 L.Ed.2d 519 (2004), pertains to the issue of third-party standing, which is not the basis of Thompson's claim. However, even if the concurrence's restrictive reading of § 2000e-5 were correct, it does not follow that Thompson would not have standing to bring his claim. As explained above, Congress intended for individuals to have "unfettered access to statutory remedial mechanisms," *Burlington,* 548 U.S. at 64, 126 S.Ct. 2405, and to honor such intent, Thompson must be counted among the class of individuals protected by the antiretaliation clause. Therefore, it is not at all "obvious[ ] [that] the persons retaliated against, not [the] persons who are incidentally hurt by the retaliation" are the only intended beneficiaries of the antiretaliation clause. Concurrence at 19. To the contrary, for the reasons discussed above, the intended beneficiaries of the antiretaliation clause include employees, such as Thompson, who are fired allegedly because of their intimate relationships with other employees who have filed EEOC charges of discrimination.

Moreover, we previously have held that Title VII standing is as broad as Article III standing. *See EEOC v. Bailey Co.,* 563 F.2d 439, 452 (6th Cir.1977); *see also Kyles v. J.K. Guardian Sec. Servs., Inc.,* 222 F.3d 289, 295 (7th Cir.2000) (holding that the language of § 2000e-5 "signals a congressional intent to extend standing to the outermost limits of Article III"). No one has asserted that Thompson lacks Article III standing, nor could they given the fact that Thompson has an injury-in-fact caused by North

American Stainless that can be redressed if Thompson is victorious in this action. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Thus, even approaching this case in the way that the concurrence suggests, I would still conclude that Thompson can sue under Title VII.

IV. CONCLUSION

For the reasons expressed in this opinion, in the panel's opinion, and in Judge Martin's dissenting opinion, which I join fully, I would permit Thompson's retaliation action to proceed.

WHITE, Circuit Judge, dissenting.

All members of the en banc panel appear to agree that the firing of an employee's co-worker-spouse (or co-worker-fiancée) in retaliation for the employee's opposition to an unlawful employment practice is unlawful under § 704(a), 42 U.S.C. § 2000e-3(a). The majority does not agree, however, that the fired spouse has a right to sue under Title VII. Like the other dissenting judges, I disagree. I write separately to make clear that I do not rely on Title VII's broad remedial purpose to reach this conclusion. Although recognizing Thompson's right to maintain an action is consistent with Title VII's remedial purpose, I would not find such a right were it contrary to the plain meaning of the statute. In short, while I join in Judge

Moore's and Judge Martin's dissenting opinions, I come to that point after rejecting the majority's conclusion that § 704(a), which makes it unlawful to discriminate against an employee because he has opposed an unlawful employment practice, unambiguously provides that only the person who opposed the violation can maintain the action.[1]

I

The majority states that in its view,

> the text of § 704(a) is plain in its protection of a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, plaintiff must show that his employer discriminated against him "because *he has opposed* any practice made an unlawful employment practice by this subchapter, or because *he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

* * *

[1] Two issues of statutory interpretation are implicated here. The first is whether Thompson can maintain an action on the basis that Defendant North American Stainless fired him as a means of retaliating against Regalado for her opposition; the second is whether, under the recently decided case of *Crawford v. Metropolitan Government of Nashville*, ___ U.S. ___, 129 S.Ct. 846, 172 L.Ed.2d 650 (2009), Thompson can maintain an action on the basis that he was fired because he supported Regalado's opposition. I first address the former issue.

> By application of the plain language of the statute, Thompson is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation.

Majority Op. at 808 (emphasis in original). The majority correctly observes that "*Burlington Northern* [*& Santa Fe Ry. Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006),] addressed the scope of actionable retaliation committed by the employer under § 704(a), an issue that is separate and distinct from whether § 704(a) permits an employee who did not himself engage in protected activity to bring a retaliation claim. . . ." Majority Op. at 815. The majority then contrasts § 704(a)'s lack of limiting language regarding retaliatory discrimination (at issue in *Burlington Northern*) with the language of § 704(a) it finds pertinent to this case:

> The statutory language of § 704(a) pertinent to the present case is not silent regarding who falls under the umbrella of its protection. It explicitly identifies those individuals who are protected-employees who "opposed any practice made an unlawful employment practice" or who "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing" under Title VII. Section 704(a) thus clearly limits the class of claimants to

> those who actually engaged in the protected activity.

Id.

Thus, the majority looks to the plain language of § 704(a) and finds in it the answer to the question whether § 704(a) permits an employee who did not himself engage in protected activity to bring a retaliation claim. But, the plain language of § 704(a) is addressed to declaring that particular conduct by an employer constitutes an unlawful employment practice. Contrary to the majority's characterization, the statutory language does not tell us "*who* falls under the umbrella of its protection," Majority Op. at 815, but rather, *what* conduct is prohibited. The plain language of § 704(a) simply declares that it is unlawful to discriminate against an employee because that employee opposed an unlawful employment practice. The focus is on the prohibited retaliatory conduct. This, I believe, is the point made by the concurrence. It is true that by prohibiting the retaliatory conduct, Congress protected the employee, but the fact remains that § 704(a) speaks in terms of unlawful *conduct*, albeit as a means of protecting employees.

Because the language of § 704(a) addresses *what* is forbidden, rather than *who* is protected, the majority must make an inference to reach its conclusion that § 704(a) tells us who is and is not protected against the actions it prohibits, and then, more importantly, deduce from that inference who

may and may not maintain a cause of action. Conceding, arguendo, that the majority's inference is reasonable, it is not the only reasonable inference to be made. This, in my view, undermines the majority's reliance on the plain language of § 704(a) as a barrier to recognizing Thompson's right to maintain an action.

Section 704(a) tells us that it is an unlawful employment practice for an employer to discriminate against an opposing employee by firing that employee's co-employee-fiancée in retaliation for the opposing employee's opposition to an unlawful practice. To be sure, the unlawful employment practice prohibited by § 704(a) is discrimination against an employee who has opposed an unlawful practice, or supported another's opposition. *See Burlington Northern,* 548 U.S. at 56, 126 S.Ct. 2405. It does not follow, however, that an employer cannot commit an unlawful employment practice under § 704(a) by discriminating against the opposing employee through the vehicle of firing that employee's co-employee spouse. As the separate opinions have noted, it appears that all of us recognize that this would be unlawful conduct under *Burlington Northern.*

The majority goes beyond the language of § 704(a), concluding that even if Thompson can prove such a case, he cannot maintain the action because he is not the person who opposed the unlawful practice. The majority bases this conclusion on the plain meaning it ascribes to § 704(a), notwithstanding that

§ 704(a) does not purport to address the question who can bring a charge or maintain an action based on a violation. Essentially, the majority concludes that Thompson does not have a right not to be harmed in his employment by this particular unlawful employment practice because although the unlawful practice harmed him, and although the harm was the intended consequence of the unlawful practice (albeit an intermediate harm in path to the ultimate goal of harming Regalado), only the opposing employee is protected by § 704(a).

In contrast, the statutory provisions can reasonably be understood to mean that certain retaliatory conduct by an employer (such as that allegedly involved here) is unlawful; that when an employer engages in such conduct, it violates § 704(a); and once the employer's conduct is found to violate § 704(a), there is no reason to look back to that section to determine who may maintain an action based on the violation. As noted by the concurrence, the provisions addressing the filing of charges and civil actions are found in a different section, 42 U.S.C. § 2000e-5(b), which refers to persons "aggrieved." Thus, to answer the question whether Thompson can sue based on the § 704(a) violation, we need ask whether Thompson is aggrieved by the unlawful employment practice.

Accepting the allegations as pled, Thompson, himself, is unquestionably a person claiming to be aggrieved by an unlawful employment practice – the retaliation against Regalado. As Judge Moore ably

discusses, there is no support for the conclusion that Thompson is not sufficiently aggrieved.

The concurrence rejects the plain meaning of "aggrieved" – to be "injured or wronged in one's rights"[2] – which would clearly include Thompson, in favor of a policy-based meaning that restricts the word's scope to "those persons who are the intended beneficiaries of the protection enacted in the substantive provision," Concurring Op. at 817, thus linking the definition of "aggrieved" to the substantive violation. Through this linkage, the concurrence reaches the same ultimate conclusion as the majority – that the person aggrieved must be the person who opposed the unlawful practice. The concurrence fears that persons who are not the intended beneficiaries of Title VII might sue. But this broader concern need not be satisfied by artificially restricting the plain meaning of "aggrieved" and declaring that only the person who opposed the unlawful practice can be aggrieved within the meaning of the statute. Title VII deals with discrimination in employment. The concurrence's hypothetical creditor-plaintiff and shareholder-plaintiff can clearly be eliminated as not being within the scope of Title VII's protections. Moreover, Title VII is already limited in scope – a co-employee plaintiff such as Thompson must prove that he was discriminated against in his employment

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[2] Oxford English Dictionary Online, http://www.dictionary.oed.com (defining "aggrieved").

either because he opposed his employer's unlawful employment practice with respect to his co-employee/fiancée or because his employer sought to retaliate against his co-employee/fiancée by firing him. If the co-employee plaintiff proceeds according to the latter theory – the one at issue here – he must establish that the employer's motivation for the employment action by which he was aggrieved was to retaliate against the person who opposed the unlawful practice. Where the relationship between the two employees is more attenuated, it will be more difficult to prove this unlawful motivation.

To be sure, lines must be drawn. And despite our differences, all members of the panel agree that Congress should draw those lines, not the courts. The majority concludes that Congress drew the line at issue here in § 704(a) by describing the unlawful practice in terms that refer to the opposing employee. I conclude that Congress described the unlawful practice in terms that refer to the opposing employee because it is discrimination against the opposing employee that is unlawful, and that Congress intended to protect employees who are aggrieved by unlawful employment practices. To be sure, every employee is not aggrieved when one employee is retaliated against. But sometimes the employer may retaliate in such a way that other employees will be directly and intentionally harmed. It is more consistent with the statutory language and purpose to draw the line by determining if there has been an unlawful employment practice and then asking if the

plaintiff is aggrieved within Congress's use of the term, than it is to draw the line by, in effect, turning an otherwise unlawful practice into an acceptable one by declaring that the person aggrieved by the practice is not within the protection of the provision that makes the undeniably unlawful conduct unlawful. The former approach, which views conduct as either unlawful under § 704(a) or not, and proceeds from that point forward asking if a claimant is aggrieved, thus respecting the plain language of both statutory provisions at issue here, is preferable to the approach that restricts the plain language of these provisions in anticipation of cases yet to come. At the very least, the statutory provisions can be reasonably construed in this fashion. It does no violence to the plain meaning of § 704(a), and is consistent with it, to hold that Thompson can establish an unlawful employment practice under § 704(a) if he proves that he was fired as an act of retaliation against Regalado. Having reached this point, I concur in Judge Moore's opinion.

II

The preceding discussion has been addressed to the issue whether Thompson can maintain an action based on his being fired as an act of retaliation against Regalado, as this is the posture in which the case has been litigated thus far. I agree with the majority that this claim is not directly affected by the *Crawford* decision because it does not rest on Thompson's opposition. Nevertheless, I agree with

Judge Moore and Judge Martin that we should not ignore *Crawford*'s effect on Thompson's rights under § 704(a); that post-*Crawford,* the record is sufficient to create a genuine issue whether Thompson himself "opposed" an unlawful employment practice; that he should be permitted to amend his complaint to allege such opposition should he choose to do so; and that if the case raises no issues concerning his opposition under *Crawford,* the majority has no reason to reach the issue.

III

In sum, the question before us is whether Thompson's action, which is consistent with the intent of the statute, is in fact authorized. The majority concludes that it is precluded by the language of § 704(a), but § 704(a) does not present the plain-meaning problem identified by the majority. The relevant questions are whether defendant violated § 704(a) and whether Thompson is a person aggrieved by that violation. Thompson has made a sufficient showing to survive summary judgment as to both. While an overly broad construction of "aggrieved" might be problematic if taken to the extreme, one need not go down that path here because Thompson lost his job and it is difficult to conceive of a potential plaintiff being more aggrieved. Because we are reviewing the grant of a motion for summary judgment and the intervening case of *Crawford* has significantly changed how Thompson

might be able to proceed, he should be permitted to amend should he choose to do so.

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520 F.3d 644

United States Court of Appeals,
Sixth Circuit.

Eric L. THOMPSON, Plaintiff-Appellant,
v.
NORTH AMERICAN STAINLESS, LP,
Defendant-Appellee.

No. 07-5040.

Argued: Sept. 18, 2007.

Decided and Filed: March 31, 2008.

Rehearing En Banc Granted,
Opinion Vacated July 28, 2008.

ARGUED: David O'Brien Suetholz, Segal, Lindsay & James, Louisville, Kentucky, for Appellant. Leigh G. Latherow, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellee. Gail S. Coleman, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae. ON BRIEF: David O'Brien Suetholz, Joseph Delano Wibbels, Jr., Segal, Lindsay & James, Louisville, Kentucky, for Appellant. Leigh G. Latherow, Gregory L. Monge, VanAntwerp, Monge, Jones, Edwards & McCann, LLP, Ashland, Kentucky, for Appellee. Gail S. Coleman, Equal Employment Opportunity Commission, Washington, DC, for Amicus Curiae.

Before: MOORE and GRIFFIN, Circuit Judges; TARNOW, District Judge.*

TARNOW, D.J., delivered the opinion of the court, in which MOORE, J., joined. GRIFFIN, J. (pp. 650-56), delivered a separate dissenting opinion.

OPINION

TARNOW, District Judge.

Shortly after Appellant Eric Thompson's fiancée filed a discrimination charge with the EEOC against their common employer, the Appellee, Thompson was terminated. The parties to this appeal ask whether the anti-retaliation provisions in Title VII of the Civil Rights Act protect a related or associated third party from retaliation under such circumstances. We hold that that they do, and REVERSE the district court's grant of summary judgment to the employer.

I.

From February 1997 through March 2003, the plaintiff, Eric L. Thompson, worked as a metallurgical engineer for defendant North American Stainless, LP, the owner and operator of a stainless steel manufacturing facility in Carroll County, Kentucky. Thompson met Miriam Regalado, currently his wife,

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* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.

when she was hired by the defendant in 2000, and the couple began dating shortly thereafter. At the time of Thompson's termination, he and Regalado were engaged to be married, and their relationship was common knowledge at North American Stainless.

According to the complaint, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) in September 2002, alleging that her supervisors discriminated against her based on her gender. On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. Slightly more than three weeks later, on March 7, 2003, the defendant terminated Thompson's employment. Thompson alleges that he was terminated in retaliation for his then-fiancée's EEOC charge, while North American Stainless contends that performance-based reasons supported the plaintiff's termination.

Thompson filed a charge with the EEOC, which conducted an investigation and found "reasonable cause to believe that [the Defendant] violated Title VII." After conciliation efforts were unsuccessful, the EEOC issued a right-to-sue letter and Thompson filed a cause of action against North American Stainless in the Eastern District of Kentucky.

North American Stainless moved for summary judgment, contending that the plaintiff's claim, that his "relationship to Miriam Thompson [née Regalado] was the sole motivating factor in his termination," was insufficient as a matter of law to support a cause of action under Title VII. The district court granted

the defendant's motion, holding that Thompson failed to state a claim under either the anti-discrimination provision contained in 42 U.S.C. § 2000e-2(a) or the anti-retaliation provision set forth in 42 U.S.C. § 2000e-3(a).

The plaintiff appeals from this judgment, contending that the anti-retaliation provision of Title VII prohibits an employer from terminating an employee based on the protected activity of his fiancée who works for the same employer. The EEOC has filed an *amicus curiae* brief in support of plaintiff's position.

II.

A.

A district court's grant of summary judgment is reviewed *de novo*. *Cicero v. Borg-Warner Automotive, Inc.*, 280 F.3d 579, 583 (6th Cir.2002) (citing *Doren v. Battle Creek Health Sys.*, 187 F.3d 595, 597 (6th Cir.1999)). In reviewing the decision, we apply the same legal standard as the lower court. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 657 (6th Cir.2000). Summary judgment is only appropriate when the evidence submitted shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Cicero*, 280 F.3d at 583 (quoting Fed.R.Civ.P. 56(c)).

B.

Section 704(a) of Title VII of the Civil Rights Act prevents retaliation by employers for two types of activity, opposition, and participation.

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3.

We are asked whether section 704(a)'s protections extend to persons not expressly described in the statute. Specifically, does Title VII prohibit employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action? As such conduct would undermine the purposes of Title VII, we hold that such retaliatory action is prohibited.

C.

Defendant argues that the statute is unambiguous. That is, the plain language of the statute indicates that the only individual protected by 704(a) is the one who conducted the protected activity.

However, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute[.]" *Bob Jones University v. United States*, 461 U.S. 574, 586, 103 S.Ct. 2017, 2025, 76 L.Ed.2d 157 (1983). Further, "it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but *will take in connection with it the whole statute . . . and the objects and policy of the law. . . .*" *Id.* (alterations in original) (quoting *Brown v. Duchesne*, 19 How. 183, 194, 15 L.Ed. 595 (1857)).

Robinson v. Shell Oil, 519 U.S. 337, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997), which also interpreted section 704(a), stated that whether a statute is plain and unambiguous can only be evaluated "with regard to the particular dispute in the case." *Id.* at 340, 117 S.Ct. 843. A court must evaluate not only the contested statutory language, but also "the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341, 117 S.Ct. at 846.

Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), discussed that broader context and the object of Title VII: "The anti-retaliation provision seeks to secure [a non-discriminatory workplace] by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* at

2412. It characterized section 704(a)'s primary purpose as "[m]aintaining unfettered access to statutory remedial mechanisms." *Id.* (quoting *Robinson*, 519 U.S. 337, 346, 117 S.Ct. 843, 136 L.Ed.2d 808). *Burlington* held that a plaintiff must demonstrate a "materially adverse" retaliatory action, which it defined as one that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 2415 (quotation marks and citations omitted).

Here, a literal reading of section 704(a) suggests a prohibition on employer retaliation only when it is directed to the individual who conducted the protected activity. Such a reading, however, "defeats the plain purpose" of Title VII. There is no doubt that an employer's retaliation against a family member after an employee files an EEOC charge would, under *Burlington*, dissuade "reasonable workers" from such an action.

Support for our holding is found as well in the EEOC Compliance Manual. *See Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986) ("[EEOC] Guidelines, while not controlling . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (quotation marks and citations omitted); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158 (1971) ("The administrative interpretation of the [Civil Rights] Act by the enforcing agency is entitled to great deference."). The *Burlington* decision also

found support in the Compliance Manual for its interpretation of section 704(a), *see* 126 S.Ct. at 2413-14, as did *Robinson, see* 117 S.Ct. at 848.

The Compliance Manual expressly states that a person claiming retaliation need not be the one who conducted the protected activity. "Title VII . . . prohibit[s] retaliation against someone *so closely related to or associated with* the person exercising his or her statutory rights that it would discourage that person from pursuing those rights." *Johnson v. University of Cincinnati,* 215 F.3d 561, 580 (6th Cir.2000) (emphasis added) (quoting EEOC Compliance Manual (CCH) ¶ 8006).

D.

Our holding today is consistent with Circuit precedent, as well as interpretive practices of both this Court and the Supreme Court. In *EEOC v. Ohio Edison Co.,* 7 F.3d 541 (6th Cir.1993), we observed that

> courts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear purpose in proscribing retaliatory activity. Contrary to defendant's assertions, courts have frequently applied the retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy behind the

> statute supports a non-exclusive reading of the statutory language.

Id. at 545. We expressly stated, albeit in dicta, that "[w]e agreed with the reasoning of the DeMedina court that a plaintiff's allegation of reprisal for a relative's anti-discrimination activities states a claim upon which relief can be granted under Title VII." *Id.* at 544 (referring to *DeMedina v. Reinhardt,* 444 F.Supp. 573 (D.D.C.1978), *aff'd in part and remanded in part,* 686 F.2d 997 (D.C.Cir.1982)).

Other cases have gone beyond literal language to support a construction that corresponded with a statute's purpose. *Robinson, supra,* interpreted section 704(a)'s prohibition against an employer "discriminat[ing] against any of his employees" to include *former* employees, because such an interpretation was "more consistent with the broader context of Title VII and the primary purpose of § 704(a)." 117 S.Ct. at 849.

In *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc.* 173 F.3d 988 (6th Cir.1999), a white former employee sued his employer for discrimination, alleging he had been discharged because he had a biracial child. *Id.* at 994. After reviewing both the purpose of Title VII and EEOC interpretations, we held that Title VII's prohibition against discrimination "because of such individual's race," 42 U.S.C. § 2000e-2(a), extended to *indirect* discrimination, despite the term's absence from the statute. *Id.* at 995.

In *NLRB v. Scrivener,* 405 U.S. 117, 121, 92 S.Ct. 798, 801, 31 L.Ed.2d 79 (1972),[1] the Court interpreted section 8(a) of the National Labor Relations Act, which prohibited employers from "discharg[ing] or otherwise discriminat[ing] against an employee because he has filed charges or given testimony under this Act." *Id.* at 118, 92 S.Ct. 798 (quoting 29 U.S.C. § 158). Despite the plain language, the Court reversed a court of appeals ruling that an employee enjoyed no protection from reprisals for other than formal charges or formal testimony. *Id.* at 121, 92 S.Ct. 798. It reasoned that the broader purpose of section 8(a) required protection for any participation in the investigative process. *Id.* Freedom from retaliation was necessary "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *Id.* at 122, 92 S.Ct. 798 (quoting *John Hancock Mut. Life Ins. Co. v. NLRB,* 191 F.2d 483, 485, 89 U.S.App.D.C. 261, 263 (1951)).

E.

The district court relied in part on our ruling in *Bell v. Safety Grooving & Grinding, LP.,* 107 Fed.Appx. 607 (6th Cir.2004). In *Bell,* the Court affirmed a dismissal of a case under both 42 U.S.C.

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[1] The Supreme Court has relied on the National Labor Relations Act to "draw[ ] analogies . . . in other Title VII contexts." *Burlington,* 126 S.Ct. at 2414.

§§ 2000e-2 and 2000e-3. Contrary to the lower court's characterization, *Bell,* an unpublished disposition, only considered plaintiff's association with his girlfriend as it related to the discrimination claim. *Id.* at 609. The basis the court considered for the retaliation claim, under § 2000e-3, was Bell's "opposition" activities. *Id. Bell* did not analyze or decide whether § 2000e-3(a) reached retaliation claims brought under a third-party association theory.

However, the lower court acknowledged that its ruling would undermine the purposes of Title VII. That is, it recognized "that retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against." *Thompson v. North American Stainless, LP,* 435 F.Supp.2d 633, 639 (E.D.Ky.2006).

Other courts ruling similarly have made the same observation. *See, e.g., Fogleman v. Mercy Hosp., Inc.,* 283 F.3d 561, 569 (3rd. Cir.2002) ("Allowing employers to retaliate via friends and family, therefore, would appear to be in significant tension with the overall purpose of the anti-retaliation provisions, which are intended to promote the reporting, investigation, and correction of discriminatory conduct in the workplace."); *Holt v. JTM Industries, Inc.,* 89 F.3d 1224, 1227 (5th Cir.1996) ("We recognize that there is a possible risk that an employer will discriminate against a complaining employee's relative or friend in retaliation for the complaining employee's actions."). *Fogleman* even noted that "as the Seventh Circuit

sagely observed, 'To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations.'" *Id.* (quoting *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir.1987)).

The dissent asserts that "before today, no circuit court of appeals has held that Title VII creates a claim for third-party retaliation," *infra* p. 654. In fact, the Eleventh Circuit characterized as "wrongful retaliatory conduct" an EEOC claimant's charge that her husband was called by the university (their common employer) and told he would be happier teaching elsewhere. *Wu v. Thomas,* 863 F.2d 1543, 1547 (11th Cir.1989). In addition, the Seventh Circuit's decision in *McDonnell v. Cisneros,* 84 F.3d 256, 262 (7th Cir.1996) supports a broader reading of section 704(a), and cites *Wu* with approval. *Id.* at 262 *("Wu v. Thomas,* 863 F.2d 1543, 1547-48 (11th Cir.1989), goes even further in liberally interpreting section 2000e-3(a) to accomplish its evident purpose . . . ").

Other courts have expressed concerns as to whether this decision will result in a flood of suits from relatives and associates of those who file EEOC charges. *See, e.g., Fogleman,* 283 F.3d at 570 ("Congress may have feared that expanding the class of potential anti-discrimination plaintiffs beyond those who have engaged in protected activity to include anyone whose friends or relatives have engaged in protected activity would open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees.").

However, *Ohio Edison, supra,* opened that door in this Circuit in 1993, and very few cases asserting a similar cause of action have been seen. Furthermore, as a decision which permitted the brother of an EEOC claimant to maintain such an action observed, "[t]hat Plaintiff can state a claim does not establish the EEOC can prove the elements of its case." *EEOC v. Nalbandian Sales, Inc.,* 36 F.Supp.2d 1206, 1213 (E.D.Cal.1998). As part of a prima facie retaliation case, all such claimants must demonstrate, *inter alia,* "that there was a causal connection between the protected activity and adverse employment action." *Balmer v. HCA, Inc.,* 423 F.3d 606, 614 (6th Cir.2005). The requirement of a prima facie case in general, and a causal link specifically protect employers from defending against meritless suits.

Of greater concern to the court would be the result of a contrary ruling. That is, permitting employers to retaliate with impunity for opposition to unlawful practices, filing EEOC charges or otherwise participating in such efforts, as long as that retaliation is only directed at family members and friends, and not the individual conducting the protected activity. As *DeMedina* put it, "tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII." 444 F.Supp. at 580.

We REVERSE.

GRIFFIN, Circuit Judge, dissenting.

From time to time, we should remind ourselves that we are judges, not legislators. This is such a time. Because the majority has rewritten the Civil Rights Act of 1964 to conform it to their notion of desirable public policy, I respectfully dissent.

I.

Often, when judges stray from the text of a statute and legislate from the bench, they do so ostensibly to implement their perceived intent of Congress. Were judges empowered to revise and amend statutes to further what we believe to be the "purpose" of the law, there would be no limit on judicial legislation and little need for Congress. Recognizing the consequences of such unbridled judicial forays into the legislative sphere, the Supreme Court has admonished "'time and again that a legislature says in a statute what it means and means in a statute what it says there.'" *Arlington Cent. Sch. Dist. Bd. of Ed. v. Murphy,* 548 U.S. 291, 126 S.Ct. 2455, 2459, 165 L.Ed.2d 526 (2006) (quoting *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992)). Accordingly, "[w]hen the statutory language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.* (internal citations and quotation marks omitted). *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) ("[The courts']

inquiry must cease if the statutory language is unambiguous and the statutory scheme is coherent and consistent.") (internal citation and quotation marks omitted); *Rubin v. United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances.").

II.

When Congress enacted the Civil Rights Act of 1964, it created a new and limited federal cause of action for retaliation in the employment setting. The relevant language of the statute provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his *employees* or *applicants* for employment . . . *because he has opposed* any practice made an unlawful employment practice by this subchapter, or *because he has made a charge, testified, assisted, or participated* in any manner in an investigation, proceeding, or hearing under this subchapter.

Title VII of the Civil Rights Act of 1964, § 704(a), 42 U.S.C. § 2000e-3(a) (emphasis added).

It was Congress's prerogative to create – or refrain from creating – a federal cause of action for civil rights retaliation. Congress likewise was entitled to mold the scope of such legislation, making the boundaries of coverage either expansive or limited in

nature. In enacting § 704(a), Congress chose the latter. The text of § 704(a) is plain and unambiguous in its protection of a limited class of persons who are afforded the right to sue for retaliation. To be included in this class, the plaintiff must show that his employer discriminated against him "because *he* has opposed any practice made an unlawful employment practice by this subchapter, or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (emphasis added).

By application of the plain language of the statute, plaintiff Eric L. Thompson is clearly not included in the class of persons for whom Congress created a retaliation cause of action because Thompson, *himself,* did not oppose an unlawful employment practice, or make a charge, testify, assist, or participate in an investigation.

Plaintiff and the EEOC acknowledge that the text of the statute does not create a federal cause of action for third-party retaliation. Moreover, they concede that there is no evidence that Congress intended to establish such a new federal cause of action. Nonetheless, they offer various reasons why we should disregard the text of the statute in favor of their public policy preferences. The primary contention is that a "narrow" interpretation of § 704(a), limited to the statutory text, would create an "absurd" result. Further, we should defer to the EEOC's interpretation of the statute. These assertions are

dependent upon the premise that the statutory language is ambiguous. It is not.

In essence, plaintiff and the EEOC request that we become the first circuit court to hold that Title VII creates a cause of action for third-party retaliation on behalf of friends and family members who have not engaged in protected activity. The majority has accepted this dubious invitation. In doing so, the majority rewrites the law. Although the majority admits begrudgingly that "a literal reading of section 704(a) suggests a prohibition on employer retaliation only when it is directed to the individual who conducted the protected activity," the majority refuses to implement the unambiguous text of the statute because, in their view, to do so would "defeat [ ] the plain purpose of Title VII." Majority slip op. at 647.

I disagree with the majority's faulty assumption that affirmance of the district court's order necessarily contradicts the underlying objectives of § 704(a). More fundamentally, I respectfully dissent because I would enforce the plain language of the law, rather than its perceived purpose.

III.

It is well established that to prevail upon a Title VII retaliation claim, a "plaintiff must show: (1) that he engaged in activity protected by Title VII; (2) that he was the subject of adverse employment action; and (3) that there exists a causal link between his protected activity and the adverse action of his

employer." *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir.1993) (citing *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir.1984)).

In the present case, the district court ruled correctly that Thompson failed to establish the first element because there was no evidence that *he* had engaged in any sort of protected activity. Instead, Thompson's theory of recovery was that he was punished for a complaint brought by his then-fiancée. The district court reviewed the statutory text and held that "under its plain language, the statute does not authorize a retaliation claim by a plaintiff who did not himself engage in protected activity." I agree.

Previously, our only discussion of a similar issue had been limited to the dicta in *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir.1990), and *Bell v. Safety Grooving & Grinding, L.P.*, 107 Fed.Appx. 607 (6th Cir.2004) (unpublished).[1] However, neither of these cases resolved the present question. In *Ohio Edison*, we held that an employee may engage vicariously in protected activity by and through the actions of his agent, and, in *Bell*, we held that the plaintiff's non-specific complaints to management were insufficient to trigger protection for him in connection with his girlfriend's EEOC discrimination charge.

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[1] Unpublished opinions of this court are not precedentially binding under the doctrine of stare decisis. *United States v. Lancaster*, 501 F.3d 673, 677 (6th Cir.2007); *United States v. Sanford*, 476 F.3d 391, 396 (6th Cir.2007).

Although our court has not addressed directly the precise issue at hand, the Fifth, Eighth, and Third Circuit Courts of Appeal have unanimously rejected such third-party retaliation claims.

In *Holt v. JTM Industries,* 89 F.3d 1224 (5th Cir.1996), a former employee claimed that he was fired because his wife, who worked for the same company, had filed a complaint under the Age Discrimination in Employment Act ("ADEA").[2] The plaintiff in *Holt* relied upon *De Medina v. Reinhardt,* 444 F.Supp. 573 (D.D.C.1978), *aff'd in part, remanded in part,* 686 F.2d 997 (D.C.Cir.1982), in support of his position that protecting one spouse from retaliation for the other spouse's protected complaint was necessary to preserve the intent of Congress. *Holt,* 89 F.3d at 1226. The Court of Appeals for the Fifth Circuit rejected this argument, reasoning that while "[s]uch a rule of automatic standing might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities," it would "contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation." *Id.* at 1226.

The *Holt* court recognized the risk of its holding, but found that the statutory language is the law that

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[2] The test for retaliation under the ADEA is the same as the test for Title VII retaliation. *Compare Shirley v. Chrysler First, Inc.,* 970 F.2d 39, 42 (5th Cir.1992) (elements of ADEA retaliation claim) *with Ohio Edison,* 7 F.3d at 543 (elements of Title VII retaliation claim); *see also* 29 U.S.C. § 623(d).

"define[s] the types of relationships that should render automatic standing. . . ." *Id.* at 1227. The court noted that the plain language of the statute will protect most close relationships, because "[i]n most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination." *Id.* If there is any participation, then the relative or friend of the complaining party is protected by the plain language of the statute. *Id.* Thus, the statute denies protection only to those friends or relatives of a complaining employee who have not participated with the complaint. *Id.* In the instant case, Thompson does not claim to have assisted Regalado in preparing her suit. If he had, then he would be protected by the terms of the statute.

The Eighth Circuit employed this rationale in *Smith v. Riceland Foods, Inc.*, 151 F.3d 813 (8th Cir.1998). The plaintiff in *Smith* urged the court to expand Title VII to "prohibit employers from taking adverse action against employees whose spouses or significant others have engaged in statutorily protected activity." *Id.* at 819. The court rejected such a construction, concluding that it "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others from retaliation." *Id.* (citing *Holt*, 89 F.3d at 1226-27). "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for assisting or participating in any manner in a proceeding under Title VII.

Accordingly, we hold that a plaintiff bringing a retaliation claim under Title VII must establish that she personally engaged in the protected conduct." *Id.* (internal quotations and alterations omitted).

In *Fogleman v. Mercy Hospital*, 283 F.3d 561 (3d Cir.2002), the Court of Appeals for the Third Circuit addressed the issue of third-party retaliation in a substantially similar context. The plaintiff sued under the Americans with Disabilities Act ("ADA"), the ADEA, and a Pennsylvania statute, alleging that he was fired in retaliation for his father's discrimination complaint against their joint employer. As a preliminary matter, the *Fogleman* court noted that the anti-retaliation provisions of the ADA and the ADEA are nearly identical to each other and to the anti-retaliation provision of Title VII. *Id.* at 567 (citing *Krouse v. American Sterilizer Co.*, 126 F.3d 494, 500 (3d Cir.1997)). Thus, the "precedent interpreting any one of these statutes is equally relevant to interpretation of the others." *Id.* The *Fogleman* court emphatically rejected the notion of ambiguity: "Read literally, the statutes are unambiguous -- indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity." *Id.* at 568.[3] The court conceded that the case

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[3] The EEOC filed an amicus brief in *Fogleman* and unsuccessfully raised the same arguments before the Third Circuit that it makes in the present case. *See* brief of EEOC as Amicus Curiae in support of Appellant, *Fogleman v. Mercy*

(Continued on following page)

"presents a conflict between a statute's plain meaning and its general policy objectives," *id.* at 569, but held that when presented with such a conflict, respect for the separation-of-powers required it to implement the statutory text. *Id.*

The Third Circuit rejected the notion that enforcing the plain meaning of the statute would lead to dire results. In fact, it stated that there "are at least plausible policy reasons why Congress might have intended to exclude third-party retaliation claims."[4] *Id.* For instance, Congress could have thought that friends or relatives who would be at risk of retaliation would have likely participated in some manner in the protected discrimination charge. If so, then the class of people that would be available for employers to retaliate against would be quite small and limited to friends and relatives of employees that filed a protected complaint, but who were not close enough to the protected employee to have assisted with the complaint in any manner. *Id.* Congress also could have feared that allowing third-party retaliation claims would "open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees." *Id.* at 570.

Hosp., 283 F.3d 561 (3d Cir.2002) (No. 00-2263), 2001 WL 34119171.

[4] The court mentioned that it did not find these plausible policy reasons to be particularly persuasive, but was still required to defer to Congress in the crafting of statutes. *See id.*

In sum, before today, no circuit court of appeals has held that Title VII creates a claim for third-party retaliation. Although plaintiff and the EEOC argue that the language of § 704(a) is ambiguous and that enforcement of the statutory text will lead to absurd results, I disagree, as do the Third, Fifth, and Eighth Circuits, which have soundly rejected such a cause of action. Indeed, the only division that exists is between the circuit courts that have rejected third-party retaliation claims and a handful of district courts that have created this new federal cause of action. The obiter dictum seized upon by the majority from a scattering of these latter cases does not represent an established mode of statutory construction.

In enacting Title VII, Congress addressed the issue of retaliation. The statute at issue is not silent regarding who falls within the scope of its protection. While it does *not* state that third parties are *not* protected, it is framed in the positive identifying those individuals who *are* protected, thus limiting the class of claimants to those who actually engaged in the protected activity. The appropriate question is not whether Congress considered the specific facts at issue in the instant case, but whether plaintiff is included within the class of persons protected by the statute. We must look to what Congress actually enacted, not what we believe Congress might have passed were it confronted with the facts at bar. Congress drew the boundaries of protection from retaliation when it enacted § 2000e-3(a). In creating a new federal cause of action for retaliation, it was not

absurd for Congress to limit the class of persons who are entitled to sue to employees who personally opposed a practice, made a charge, assisted, or participated in an investigation.

IV.

Next, plaintiff argues that the court should defer to the EEOC's interpretation of Title VII in the EEOC Compliance Manual. In effect, the majority has done so by adopting the EEOC's undefined class of "related to or associated with" persons. All persons, no matter how loosely related or "associated" to the person who engaged in the protected activity, may sue for retaliation if they can show that adverse action taken against them would "discourage" the employee who actually engaged in the protected activity from exercising *his* rights. This expanded class of potential plaintiffs could lead to a proliferation of new retaliation lawsuits. Whether public policy warrants such litigation is a decision for Congress, not the courts.

Plaintiff cites *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), for the proposition that "administrative interpretations of ambiguous statutes are entitled to substantial deference." The *Chevron* analysis, colloquially referred to as the "Chevron two-step," requires the following analysis:

> The Chevron two-step process requires the court to ask "whether the statute is silent or ambiguous with respect to the specific issue

> before it; if so, the question for the court [is] whether the agency's answer is based on a permissible construction of the statute."

Singh v. Gonzales, 451 F.3d 400, 404 (6th Cir.2006) (citation and quotation marks omitted). Because, as explained above, § 704(a) is not ambiguous, Chevron deference is not applicable.

Even assuming arguendo that the statute is ambiguous, we should not defer to the EEOC's Compliance Manual to interpret Title VII. Most courts have rejected the notion that the EEOC Compliance Manual deserves deference. *See, e.g., Rainer v. Refco, Inc.,* 464 F.Supp.2d 742, 751 (S.D.Ohio 2006) (refusing to defer to the EEOC's manual because "an agency's interpretation of a statute is not entitled to deference where it conflicts with the plain meaning of the statutory language."); *Singh v. Green Thumb Landscaping, Inc.,* 390 F.Supp.2d 1129, 1137-38 (M.D.Fla.2005) ("This provision of the Manual is entirely lacking in the extensive analysis and thoroughness necessary to be entitled to substantial deference by the Court. Ultimately, the responsibility is with the Court, not with an administrative body, to interpret the provisions of Title VII in accordance with the explicit legislative enactments set out by the Congress.") (citation omitted).

Furthermore, the interpretation proffered by the EEOC is in its own compliance manual, not a regulation that was promulgated after formal notice-and-comment rulemaking. The Supreme Court has noted

that such "interpretations" do not carry the force of law and are not worthy of *Chevron* deference:

> Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant Chevron-style deference. *See, e.g., Reno v. Koray,* 515 U.S. 50, 61, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995) (internal agency guideline, which is not "subject to the rigors of the Administrative Procedur[e] Act, including public notice and comment," entitled only to "some deference" (internal quotation marks omitted)); *EEOC v. Arabian American Oil Co.,* 499 U.S. 244, 256-258, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991) (interpretative guidelines do not receive *Chevron* deference); *Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 157, 111 S.Ct. 1171, 113 L.Ed.2d 117 (1991) (interpretative rules and enforcement guidelines are "not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers"). *See generally* 1 K. DAVIS & R. PIERCE, ADMINISTRATIVE LAW TREATISE § 3.5 (3d ed.1994). Instead, interpretations contained in formats such as opinion letters are "entitled to respect" under our decision in *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944), but only to the extent that those interpretations have the "power to persuade."

Christensen v. Harris County, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

The EEOC cannot expand its own authority by simply publishing a compliance manual and expect the court to defer to its view that the statute means more than what the statutory language supports. Moreover, at oral argument, counsel for the EEOC conceded that, in the present case, its compliance manual is not entitled to *Chevron* deference.

V.

In conclusion, the unambiguous text of the statute, not its anticipated purpose, is the law.[5] By rewriting the Civil Rights Act to conform it to their preference for public policy, the majority has assumed the role of the legislature and usurped the authority granted to Congress by the Constitution.

For these reasons, I respectfully dissent. I would affirm the judgment of the district court.

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[5] *Arlington Central Sch. Dist. Bd. of Ed. v. Murphy,* 126 S.Ct. at 2459; *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.,* 530 U.S. at 6, 120 S.Ct. 1942; *Connecticut Nat. Bank v. Germain,* 503 U.S. at 253-54, 112 S.Ct. 1146.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CIVIL ACTION NO. 05-02

ERIC L. THOMPSON, PLAINTIFF,

v.

NORTH AMERICAN
STAINLESS, LP, DEFENDANT.

OPINION AND ORDER

* * *

This matter is before the Court on the Motion to Alter or Amend (Rec. No. 29) filed by the Plaintiff, Eric L. Thompson ("Thompson"). For the following reasons, the Court will DENY the motion.

I. FACTS.

In his Complaint, Thompson alleges that he was employed by North American from February, 1997 to March, 2003. (Rec. No. 1, Complaint ¶ 6.) He further asserts that, in September, 2002, his then-fiancé and current wife, who was also employed by North American, filed a charge with the EEOC alleging that the company discriminated against her because of her gender. (Rec.No. 1, Complaint ¶ 8). The EEOC notified North American of the charge in February, 2003. (Rec. No. 1, Complaint ¶ 8.) Thompson alleges that, after receiving notice of his wife's EEOC complaint, North American retaliated against him by terminating him. (Rec. No. 1, Complaint ¶ 9).

Thompson asserted a claim under 42 U.S.C. § 2000e-2(a)(1) against North American. That provision of Title VII makes it unlawful for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . ." 42 U.S.C. § 2000e-2(a)(1).

To establish *a prima facie* case of discrimination under Title VII, a plaintiff must demonstrate that: 1) he was a member of a protected class; 2) he was subject to an adverse employment action; 3) he was qualified for the job; and 4) for the same or similar conduct, he was treated differently from similarly situated non-minority employees. *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir. 2000). In its June 20, 2006 Opinion and Order granting North American summary judgement, the Court determined that Thompson was not a member of a protected class for purposes of a discrimination claim under 42 U.S.C. § 2000e-2 and that this claim failed as a matter of law.

Title VII's antiretaliation provisions are found at 42 U.S.C. § 2000e-3 which makes it unlawful for an "employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by" by Title VII "or because he has made a charge, testified, assisted, or participated in any manner in an

investigation, proceeding or hearing under" Title VII. 42 U.S.C. § 2000e-3(a).

In order to succeed on a Title VII retaliation claim, the plaintiff must show: 1) that he engaged in activity protected by Title VII; 2) that he was the subject of an adverse employment action; and 3) that there exists a causal link between his protected activity and the adverse action of his employer, *Equal Employment Opportunity Commission v. Ohio Edision Co.*, 7 F.3d 541, 543 (6th Cir. 1993).

In its June 30, 2006 Opinion and Order, the Court determined that, to the extent that Thompson claimed that he was retaliated against due to his own activities in opposition to his employer's treatment of his finance´. He had not presented any evidence that he sufficiently opposed any act made unlawful under Title VII to warrant § 2000e-3(a) protection against retaliation.

Likewise, Thompson had not presented any evidence that North American was aware of any assistance he may have provided his fiancé in filing her EEOC complaint.

The Court further determined that, under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity. Given this plain language, and for reasons further detailed in the Court's June 20, 2006 Opinion and Order, the Court dismissed Thompson's retaliation claim.

With his Motion to Alter or Amend, Thompson asks the Court to reconsider its June 20, 2006 decision in light of the Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White,* 126 S.Ct. 2405 (June 22, 2006). In that case, the Supreme Court addressed the reach of the phrase "discriminate against" in Title VII's anti-retaliation provisions. Specifically, the Court answered whether the provisions confines "actionable retaliation provisions confines "actionable retaliation to activity that affects the terms and conditions of employment? And how harmful must the adverse actions be to fall within its scope?" *Id.* At 2408. The *Burlington Northern* decision did not address the issue currently before this Court which is whether Title VII permits a retaliation claim by a plaintiff who did not himself engage in protected activity. Accordingly, the Court will not alter its June 20, 2006 Opinion and Order in light of the Supreme Court's decision in *Burlington Northern.*

For the above reasons, the Court hereby ORDERS that the Plaintiff's Motion to Alter or Amend (Rec. No. 29) is DENIED.

Dated this 18th day of December, 2006

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435 F.Supp.2d 633

United States District Court,
E.D. Kentucky,
Frankfort.

Eric L. THOMPSON, Plaintiff,
v.
NORTH AMERICAN STAINLESS, LP, Defendant.

Civil Action No. 05-02.

June 20, 2006.

David O'Brien Suetholz, Herbert L. Segal, Segal, Stewart, Cutler, Lindsay, Janes & Berry, PLLC, Louisville, KY, for Plaintiff.

Carl D. Edwards, Jr., Gregory L. Monge, Leigh Gross Latherow, Vanantwerp, Monge, Jones & Edwards, Ashland, KY, for Defendant.

OPINION AND ORDER

CALDWELL, District Judge.

This matter is before the Court on the Motion for Summary Judgment (Rec. No. 12) of the Defendant North American Stainless, FLP ("North American").

I. FACTS.

In his Complaint, the Plaintiff, Eric L. Thompson, alleges that he was employed by North American from February, 1997 to March, 2003. (Rec. No. 1, Complaint ¶ 6). He further asserts that, in September, 2002, his then-fiancé and current wife,

who was also employed by North American, filed a charge with the EEOC alleging that the company discriminated against her because of her gender. (Rec. No. 1, Complaint ¶ 8). The EEOC notified North American of the charge in February, 2003. (Rec. No. 1, Complaint ¶ 8). Thompson alleges that, after receiving notice of his wife's EEOC complaint, North American retaliated against him by terminating him. (Rec. No. 1, Complaint ¶ 9).

II. STANDARD ON SUMMARY JUDGMENT.

Under Fed.R.Civ.P. 56, summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

The moving party bears the initial responsibility of "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The movant may meet this burden by demonstrating the absence of evidence supporting one or more essential elements of the nonmovant's claim. *Id.* at 322-25, 106 S.Ct. 2548. Once the movant

meets this burden, the opposing party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e).

III. ANALYSIS.

A. Discriminatory Termination under § 2000e-2(a).

Title VII makes it unlawful for an employer to "discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin. . . ." 42 U.S.C. § 2000e-2(a)(1).

To establish a *prima facie* case of discrimination under Title VII, a plaintiff must demonstrate that: 1) he was a member of a protected class; 2) he was subject to an adverse employment action; 3) he was qualified for the job; and 4) for the same or similar conduct, he was treated differently from similarly situated non-minority employees. *Perry v. McGinnis*, 209 F.3d 597, 601 (6th Cir.2000).

In *Bell v. Safety Grooving & Grinding, L.P.*, 107 Fed.Appx. 607 (6th Cir.2004), the Plaintiff, Bell, charged that his former employer declined to rehire him after a seasonal layoff because his girlfriend filed a gender discrimination charge against the employer with the EEOC. *Id.* at 609. Bell asserted both a retaliation claim and a discrimination claim under Title VII against the employer, arguing that the

employer discriminated against him because of his association with his girlfriend – a member of a protected class. *Id.* With regard to the plaintiff's discrimination claim under § 2000e-2(a), the Sixth Circuit stated the following:

> This court has found association with a protected party to be relevant under § 2000e-2(a) in just two situations; neither avails Bell's Title VII claim. In *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, the court reasoned that "a white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against the biracial child." 173 F.3d 988, 994 (6th Cir.1999). The white employee was protected under Title VII not simply because of his relationship to his biracial child but because this relationship made the employee's own race the basis of his employer's discrimination, violating Title VII's prohibition against discrimination on the basis of race. *Id.* at 994-95. Bell, meanwhile, is claiming discrimination based solely on his relationship with his girlfriend, an association that – unlike the plaintiff's relationship with his child in *Tetro* – does not affect Bell's own Title VII status. And in *Johnson v. University of Cincinnati*, the court held that the plaintiff, a university administrator, stated a claim of Title VII discrimination not because of his status as an African-American but because of his advocacy on behalf of

> minorities and women. 215 F.3d 561, 575 (6th Cir.2000). We do not view Bell's actions on behalf of Fetty as analogous to the significant advocacy engaged in by the plaintiff in *Johnson*. Bell discussed neither Fetty's specific discrimination charge nor the general subject of sexual discrimination with Safety management. Moreover, Bell testified that he "didn't think [Fetty's treatment] was fair" but that he "didn't make a big issue out of it, not with anybody [at Safety]." At most, Bell complained to people at Safety about the company's business decision to have its full-time, male employees move traffic barrels instead of having Fetty move them. As he himself put it, "It was a labor issue with us men. It was not a discriminatory [sic] with us men."
>
> Accordingly, Bell has not demonstrated that he is entitled to protection under § 2000e-2(a), and we affirm the district court's grant of summary judgment on this claim.

Id.

In *Johnson,* the plaintiff was an African American who was employed by the University of Cincinnati as its Vice President of Human Resources and Human Relations and managed its affirmative action program. 215 F.3d at 566. He claimed that the University discharged him because of his efforts to insure that the University complied with its affirmative action policies and because of his

advocacy on behalf of women and minorities. *Id.* at 572.

As to the plaintiff's discrimination claim under 42 U.S.C. § 2000e-2, the district court held that the claim failed because he "postur[ed] his protected status, not as a member of a racial minority, but rather as a person who advocates on behalf of women and minorities." *Id.* at 573. The Sixth Circuit reversed, stating that "the fact that Plaintiff has not alleged discrimination because of *his* race is of no moment inasmuch as it was a racial situation in which Plaintiff became involved – Plaintiff's advocacy on behalf of women and minorities in relation to Defendant's alleged discriminatory hiring practices – that resulted in Plaintiff's discharge from employment." 215 F.3d at 575.

Though the plaintiff was an African American, the Court further stated that, "[i]t is clear that a Caucasian high-level affirmative action official could bring a claim under § 1981 and § 2000e-2(a) for discrimination based upon his advocacy on behalf of minorities because the discrimination would be 'because of such individual's race,' where the race of the minorities for which he was advocating would be 'imputed' if you will to the Caucasian high-level affirmative action official." *Id.*

Thompson has not alleged that he engaged in any significant advocacy on behalf of women or minorities. Thus, this is not a case like *Johnson* where the Court can impute a protected race or gender to

Thompson. Further, unlike the plaintiff in *Tetro*, Thompson is not claiming that his relationship with his wife made Thompson's own race or gender the basis of his employer's discrimination. Accordingly, Thompson is not a member of a protected class for purposes of a discrimination claim under 42 U.S.C. § 2000e-2 and this claim fails as a matter of law.

B. Retaliation under 42 U.S.C. § 2000e-3.

Title VII's antiretaliation provisions are found at 42 U.S.C. § 2000e-3 which makes it unlawful for an "employer to discriminate against any of his employees. . . . because he has opposed any practice made an unlawful employment practice" by Title VII "or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under" Title VII. 42 U.S.C. § 2000e-3(a).

In order to succeed on a Title VII retaliation claim, the plaintiff must show: 1) that he engaged in activity protected by Title VII; 2) that he was the subject of an adverse employment action; and 3) that there exists a causal link between his protected activity and the adverse action of his employer. *Equal Employment Opportunity Commission v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir.1993).

To the extent that Thompson claims that he was retaliated against due to his own activities in opposition to his employer's treatment of his fiancé, he has not presented any evidence that he sufficiently

opposed any act made unlawful under Title VII to warrant § 2000e-3(a) protection against retaliation. Likewise, Thompson has not presented any evidence that North American was aware of any assistance he may have provided his fiancé in filing her EEOC complaint.

Thompson's complaint, however, is not that he was retaliated against because of his own protected activity, but that he was retaliated against because his fiancé filed an EEOC complaint against North American. Again, Title VII prohibits employers from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

Guided by this language, several circuits have held that retaliation against a person who has not himself engaged in protected conduct is not actionable under Title VII. *See Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir.1998) ("[T]he rule . . . that a plaintiff bringing a retaliation claim need not have personally engaged in statutorily protected activity if his or her spouse or significant other, who works for the same employer has done so[,] is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation."); *Fogleman v. Mercy Hospital, Inc.*, 283 F.3d 561, 570 (3d Cir.2002) (interpreting similar language in the ADA and

ADEA); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir.1996) (ADEA); *see also Higgins v. TJX Companies, Inc.*, 328 F.Supp.2d 122 (D.Me.2004).

Nevertheless, recognizing that retaliating against the friends and relatives of employees who oppose unlawful employment practices will deter employees from exercising their protected rights just as much as retaliating against the employees themselves, other courts and the EEOC have interpreted Title VII to prohibit retaliation against a third-party. *See, e.g., DeMedina v. Reinhardt,* 444 F.Supp. 573, 580 (D.D.C.1978) ("Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation . . . [and] tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII."), *aff'd in relevant part,* 686 F.2d 997 (D.C.Cir.1982); *Gonzalez v. New York State Dep't of Correctional Servs.,* 122 F.Supp.2d 335, 346-47 (N.D.N.Y.2000) ("[B]ecause plaintiff alleges to have suffered adverse employment action by Defendants because of her husband's complaints of discrimination, she has standing to assert a Title VII claim."); *EEOC v. Nalbandian Sales, Inc.,* 36 F.Supp.2d 1206, 1211-12 (E.D.Cal.1998) (recognizing third party retaliation claims asserted under Title VII partly in deference to the EEOC's "long-standing policy" of recognizing and enforcing such claims); E.E.O.C. Compliance Manual § 8-II(B)(3)(c) ("Title VII . . . prohibit[s] retaliation against someone so

closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights.")

Looking just to the language of the statute, this Court agrees with those Courts which have determined that, under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity. The statute prohibits an employer from discriminating against any employee because "*he* has opposed any practice made an unlawful employment practice" by Title VII "or because *he* has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under" Title VII. 42 U.S.C. § 2000e-3(a) (emphasis added). It is clear that *he* refers to the employee who has suffered discrimination, thus requiring that the person retaliated against be the person who engaged in protected conduct. The statute is not ambiguous in this regard.

Nevertheless, in *Ohio Edison,* the Sixth Circuit quoted approvingly from the D.C. district court's opinion in *De Medina* approving of third party retaliation claims. 7 F.3d at 543-44. Accordingly, some courts have interpreted *Ohio Edison* to indicate the Sixth Circuit's approval of such claims. *See, e.g., McKenzie v. Comcast Cable Communications, Inc.,* 393 F.Supp.2d 362, 380 (D.Md.2005); *But see Gonzalez,* 122 F.Supp.2d at 347 (stating that "arguably," *Ohio Edison* stands for the proposition that one employee may bring a Title VII claim when he is retaliated against for the actions of another

employee but that the decision's holding is limited to situations where "an employee, or his representative, has opposed any practice made an unlawful employment practice."); *Higgins,* 328 F.Supp.2d at 124 n. 2 (*Ohio Edison* is limited to situations where one employee engaged in protected conduct on behalf of another employee).

In *Ohio Edison,* the EEOC filed a complaint under Title VII, alleging that an employer withdrew an offer to reinstate a minority employee ("Whitfield") in retaliation for a co-employee's complaints regarding discriminatory treatment of Whitfield. 7 F.3d at 542. The complaining co-employee was also a minority. *Id.*

The district court dismissed the complaint because Title VII does not specifically cover discrimination against one employee for the acts of another. *Id.* at 543. The Sixth Circuit reversed, recognizing that, while Title VII "makes it unlawful for an employer to discriminate against an employee because the employee opposed an unlawful employment practice, or made a charge, or participated in an investigation, proceeding, or hearing related to Title VII," the statute "does not specifically cover the situation in the present case in which the employee's (or former employee's) representative engages in protected activity on his behalf and the employee, who had his representative act for him, is then retaliated against." *Id.* at 543.

The Court held that the language – "because he has opposed any practice made an unlawful employment practice under this subchapter," – in Title VII should be construed to include a claim "in which an employee, *or his representative,* has opposed any practice made an unlawful employment practice." *Id.* at 545-46.

Thus, the precise issue before the Court in *Ohio Edison* was whether a plaintiff employee who was retaliated against could assert a retaliation claim where a co-employee, *acting as the plaintiff employee's representative and at the plaintiff employee's behest,* opposed an unlawful employment practice of which the plaintiff employee was the victim. The case appears to hold that, in such cases, the protected activity of the plaintiff employee's agent is imputed to the plaintiff employee. Here, Thompson is not claiming that he was retaliated against because another employee engaged in protected activity on Thompson's behalf to protest an unlawful employment action of which Thompson was the victim. Instead, Thompson is claiming that he was retaliated against because his fiancé engaged in protected activity on her own behalf to protest an unlawful employment action of which she was the victim.

After *Ohio Edison,* in *Johnson,* the Sixth Circuit, quoted approvingly from the EEOC Compliance Manual stating that the "person claiming retaliation need not be the person who engaged in the opposition, such that 'Title VII . . . prohibit[s] retaliation against someone so closely related to or associated with the

person exercising his or her statutory rights that it would discourage that person from pursuing those rights.'" *Johnson,* 215 F.3d at 580 (quoting from the EEOC Compliance Manual ¶ 8006).

Nevertheless, *Johnson* did not involve a third party retaliation claim. Again, in *Johnson,* the plaintiff was a minority employee who administered the University's affirmative action program. For his retaliation claim under § 2000e-3(a), he claimed he was retaliated against because he himself opposed the University's allegedly illegal hiring practices and because he himself participated in filing an EEOC claim. 215 F.3d at 578. The Court ultimately determined that the plaintiff had established that he had opposed conduct which he reasonably believed to be unlawful. *Id.* at 581. Thus, any statements the Sixth Circuit made in that case regarding third party retaliation claims, while instructive, were dicta and not determinative of any issue before that Court or currently before this Court.

In contrast, in *Bell,* a more recent, albeit unpublished, decision, the Sixth Circuit was faced with the issue that is now before this Court. Again, in *Bell,* the plaintiff charged that his employer failed to rehire him in retaliation for his girlfriend's EEOC charge. 107 Fed.Appx. at 609. In analyzing Bell's retaliation claim under § 2000e-3, the Sixth Circuit considered only the plaintiff's own opposition to his employer's treatment of the plaintiff's girlfriend and determined that the plaintiff had not showed active and consistent opposition. *Id.* at 610. In determining

whether the plaintiff had engaged in protected activity, the Sixth Circuit did not consider the plaintiff's girlfriend's protected activity of filing an EEOC complaint. *Id.*

Accordingly, the Court is faced with a statute which, by its plain language does not permit third party retaliation claims; the EEOC's practice of permitting such claims; Sixth Circuit cases which, in dicta, indicate that such claims are permissible; and a more recent, unpublished Sixth Circuit case which does not permit such a claim. The Court recognizes that retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against. But, the Court also finds persuasive the reasoning that Title VII already offers broad protection in such situations by prohibiting employers from retaliating against employees who oppose unlawful employment actions or who participate in any manner in a proceeding under Title VII. *See, e.g., Riceland Foods,* 151 F.3d at 819.

Given all of these considerations, the Court will dismiss Thompson's retaliation claim. In doing so, however, the Court recognizes the lack of controlling Sixth Circuit law on this issue and is therefore guided most significantly by the unambiguous language of the statute.

IV. CONCLUSION.

For the above reasons, the Court hereby ORDERS that the Defendant's Motion for Summary Judgment is GRANTED (Rec. No. 12) and this action is STRICKEN from the active docket of this Court.

STATUTES INVOLVED

Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice, made an unlawful employment practice under this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved . . . alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall . . . make an investigation thereof.

Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), provides in pertinent part:

> If a charge filed with the Commission pursuant to section (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action under this section . . . , the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against

the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
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No. 09-291

IN THE

Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is a third party afforded protection under the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a) based *solely* upon his association with an employee who has engaged in protected activity?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Respondent, North American Stainless ("NAS"), formerly known as North American Stainless LP, pursuant to Supreme Court Rule 29.6, hereby discloses that, as of November 9, 2009, it is a general partnership with no parent corporation. The managing general partner of NAS is Stainless Steel Invest, Inc., a Delaware corporation which is not a publicly held corporation. The only other partner of NAS is Stainless Alloys, Inc., a Delaware corporation, which is not a publicly held corporation. The two partners of NAS are owned by North American Stainless, Inc., a Delaware corporation, which is owned by Acerinox S.A., whose shares are publicly traded on the Madrid Stock Exchange.

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STATEMENT OF THE CASE

I. Statement of Facts.

NAS owns and operates a stainless steel manufacturing facility in Carroll County, Kentucky. During all relevant times to this action, Petitioner Eric Thompson (hereinafter "Petitioner") and his then fiancée, Miriam Regalado (hereinafter "Regalado") were at-will employees of NAS. Regalado filed a charge of discrimination against NAS with the EEOC in September 2002 alleging that her supervisors had discriminated against her on the basis of her gender.[1] Petitioner did not voice any complaints to NAS regarding NAS's alleged unlawful treatment of Regalado or otherwise assist his fiancée with her charge of discrimination. There is no claim that Petitioner is in a protected category or that he engaged in any protected activity.

Petitioner was terminated from his employment on March 7, 2003. Petitioner had submitted an unsolicited memorandum to his supervisor in which he asked rhetorical questions that demonstrated his disagreement with NAS's management practices.[2]

[1] The EEOC investigated Regalado's allegations of gender discrimination against NAS but found no basis to support her Charge of Discrimination.

[2] Some of the philosophical questions in Petitioner's memorandum written to NAS included: "Where is NAS going to be in 5 years? Where is Eric Thompson going to be in 5 years?" "Who possesses the leadership, communication skills, (Cont'd)

Petitioner believed that his termination was not the result of this insubordinate memorandum, but was based instead solely upon his relationship with his fianceé who had filed a separate charge of discrimination with the EEOC. Petitioner subsequently filed his own charge of discrimination with the EEOC.

II. District Court Dismissal by Summary Judgment and Denial of Motion for Reconsideration.

After receiving the necessary right-to-sue letter from the EEOC, Petitioner filed a Title VII action against NAS in the Eastern District of Kentucky. Petitioner alleged in his Complaint that his relationship with Regalado was "the sole motivating factor in his termination," but he did not allege that *he* had engaged in any protected behavior on behalf of himself or Regalado, a fact he confirmed in his deposition. NAS moved for summary judgment presenting the legal issue

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(Cont'd)

motivational skills, who are the strong problem solvers, and who provides independent contributions to lead NAS for the next 5 years?" "Who would be the next general V.P. today?" "If your managers would not make a good V.P. Why not?" and "Is today's management cut out for tomorrow?" In the final paragraph, Petitioner wrote that he was "surprised to see engineers being replaced by less qualified personnel." Petitioner bemoaned that it was not lawful for a person to represent himself as a physician or attorney without the required qualifications, but that there were, unfortunately, no such standards for engineers. In the final sentence of his statement, Petitioner expressed his opinion that he "would like to see a professional engineer in our department, which is a requirement to work under, before also becoming licensed."

of whether the Petitioner's relationship with Regalado, as the sole motivating factor in his termination, was sufficient — as a matter of law — to support his Title VII retaliation claim.[3]

The district court granted NAS's motion for summary judgment, holding that Petitioner had failed to state a claim under either Title VII's discriminatory discharge provision contained in 42 U.S.C. § 2000e-2(a) or the anti-retaliation provision of set forth at 42 U.S.C. § 2000e-3. The district court found that the anti-retaliation statute did not protect Petitioner where his fiancée had engaged in protected activity on behalf of herself, but not on behalf of Petitioner, and Petitioner had not engaged in protected activity on behalf of himself or his fiancée.

Petitioner subsequently filed a Motion to Alter or Amend based upon this Court's decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006). The district court appropriately recognized that *Burlington* did not address the narrow statutory construction issue in this case of whether Title VII permits a retaliation claim by a plaintiff/employee who did not himself engage in protected activity and denied Thompson's motion. Petitioner then appealed to the Sixth Circuit Court of Appeals.

[3] For purposes of summary judgment, NAS accepted that contention, but argued even if true the allegations did not support a claim.

III. Sixth Circuit's Initial Reversal of the District Court.

In a 2-1 decision issued on March 31, 2008, a three judge panel of the Sixth Circuit Court of Appeals reversed the summary judgment.[4] The panel majority's holding acknowledged that the plain language of the statute applies only to those parties who are engaged in a protected activity. While Petitioner's claim should be excluded on the plain language of the statute as he clearly was not engaged in any protected activity, the panel majority held that such a decision "defeats the plain purpose of the Title VII." Accordingly, the panel majority found that the statute should be interpreted more broadly than written.

Judge Griffin authored a well-researched and reasoned dissent in agreement with NAS's position that the plain and unambiguous language of Title VII's retaliation statute does not provide a cause of action for Petitioner to recover against NAS. The dissent appropriately and correctly recognized that the majority's opinion made the Sixth Circuit the only appellate court to hold that third parties who do not belong to any protected category and who do not, as set forth in the statute, engage in any protected activity are entitled to protection under the anti-retaliation provisions of Title VII. The dissent further correctly noted that the Fifth, Eighth and Third Circuits had rejected the argument that "third-party claims" are

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[4] The Opinion was authored by United States District Judge for the Eastern District of Michigan, the Honorable Arthur J. Tarnow.

covered under Title VII's anti-retaliation provisions. Thus, this decision created a clear split in the circuits for "third-party retaliation claims" with the Sixth Circuit standing alone in the minority.

IV. *En Banc* Rehearing and Affirming of District Court

On July 28, 2008, the Sixth Circuit granted NASA's Petition for Rehearing *En Banc*. The *en banc* Court issued its opinion on June 5, 2009, reversing the decision of the three judge panel and affirming the decision of the district court. Specifically, a majority of the *en banc* Court acknowledged that it was joining the circuits having ruled on this narrow issue, holding that a cause of action under § 2000e-3(a) is limited to persons who have personally engaged in protected activity. Petitioner had not engaged in any protected activity, and thus dismissal was warranted.

The *en banc* majority first recognized that § 2000e-3(a) is clear in limiting the class of persons it protects. Particularly, this class is limited to persons who engage in protected activity as set forth in the statute. Thus, as the Court recognized, it was required to enforce the statute according to its terms.

The Court next examined whether Petitioner asserted a proper cause of action under the statute. It noted that the first element a retaliation plaintiff must prove is that he engaged in protected activity. Petitioner had not alleged that he engaged in any such activity, and thus he did not establish this element of his claim. Therefore, the district court's summary judgment in

favor of NAS was proper. The Sixth Circuit specifically recognized that whether Petitioner had standing under § 2000e-5(f)(1) was a distinct and separate issue from whether he had a cause of action under § 2000e-3(a), and that his standing was not at issue in this case.

Finally, a majority of the *en banc* Court reviewed this Court's recent decisions in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, __ U.S. __, 129 S.Ct. 846 (2009), and *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 126 S.Ct. 2405 (2006), to determine whether those decisions might affect the Court's holding in this case. The Sixth Circuit, while specifically noting that *Crawford*'s holding that active opposition was not required for a retaliation claim, nevertheless did not reach the circumstances of this case because Petitioner had engaged in no opposition whatsoever. Additionally, the Court recognized that *Burlington Northern* addressed a wholly separate issue—the scope of retaliation under the statute—from whether an employee, such as Petitioner, who does not engage in protected activity has a viable cause of action. Petitioner subsequently filed his Petition for Writ of Certiorari to this Court.

SUMMARY OF THE ARGUMENT

Petitioner has failed to demonstrate any compelling reasons for his Petition to be granted. While he asserts that an inter-circuit conflict exists with respect to the issue of third-party retaliation claims, such a conflict does not actually exist. Rather, all of the circuits who have considered this issue have squarely rejected such claims.

Further, the *en banc* Sixth Circuit properly recognized that § 2000e-3(a) is unambiguous and must be enforced as written. The anti-retaliation provision specifically requires that an employee must have engaged in one of the actions enumerated therein. However, Petitioner admittedly took no such actions and is pursuing his claims solely on the basis of his association with another employee who did engage in protected activity under the statute.

Finally, Petitioner's public policy arguments, that enforcing the statute as written will discourage employees from reporting discrimination and frustrate the remedial purpose of the statute, are without merit. In actuality, requiring employees to take some affirmative step to be protected under the statute will actually encourage reporting. Additionally, enforcing the statute as written will ensure that courts and employers both have objective criteria for determining who or what activities are protected. Otherwise, both courts and employers will be required to delve into the highly subjective, personal, and ever-changing relationships of employees to determine whether or not an employee may be protected under the statute.

REASONS FOR DENYING THE PETITION

The *en banc* decision of the Sixth Circuit does not conflict with the decision of any other United States Court of Appeals that has ruled on the specific issue of a third party retaliation claim based solely on a plaintiff's association with a protected party, nor does the decision below implicate an important question of federal law that must be answered by this Court. Thus, Petitioner has failed to carry his burden of demonstrating any "compelling reasons" for the Petition to be granted. *See* Sup. Ct. R. 10.

I. The Sixth Circuit's Decision Is In Accord With All Other Circuits That Have Addressed Third Party Retaliation Claims Based Solely On Association.

Contrary to the Petitioner's assertions, no inter-circuit conflict exists to justify granting the Petition. Rather, the Sixth Circuit's *en banc* opinion is in accord with all other circuits having occasion to rule on the same specific issue. Specifically, Petitioner points to two decisions from the Seventh and Eleventh Circuits which he claims constitute the other side of this purported split of authority.[5] However, those cases do not address the same matter at issue in this case and are thus distinguishable.[6]

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[5] *See McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996); *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989).

[6] *See infra* pp. 12-14.

The majority of federal courts who have considered the issue of third-party causes of action have refused to recognize such claims as valid causes of action under federal anti-retaliation laws. *See Fogleman v. Mercy Hospital*, 283 F.3d 561 (3rd Cir. 2002); *Smith v. Riceland Foods*, 151 F.3d 813 (8th Cir. 1998); *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir. 1996); *Bell v. Safety Grooving & Grinding*, 107 Fed. Appx. 607 (6th Cir. 2004), *abrogated on other grounds by Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, __U.S. __, 129 S.Ct. 846 (2009); *Rainer v. Refco, Incorporated*, 464 F. Supp.2d 742 (S.D. Ohio 2006); *Singh v. Green Thumb Landscaping*, 390 F. Supp.2d 1129, 1136 (M.D. Fla. 2005); *Sukenic v. Maricopa County*, 2004 WL 3522690 (D. Ariz. 2004); *Higgins v. TJX Cos., Inc.*, 328 F. Supp. 2d 122, 123 (D. Me. 2004); *U.S. E.E.O.C. v. Bojangles Rest. Inc.*, 284 F. Supp.2d 320, 327 (M.D.N.C. 2003); *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F. Supp.2d 1123, 1143 (D. Kan. 2002); *Freeman v. Barnhart*, 2008 WL 744827 (N.D. Cal. 2008); *Dawn L. v. Greater Johnstown School District*, 586 F. Supp. 2d 332 (W.D. Pa. 2008); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240 (D.N.M. 2008). State courts, likewise, have examined this issue regarding state equivalent Title VII statutes and agree that that no cause of action exists. *See Dias v. Goodman Manufacturing Co.*, 214 S.W.3d 672 (Tex. App. 2007); *Pope v. Motel 6*, 114 P.3d 277 (Nev. 2005); *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171 (Minn. App. 2007); *Shoecraft v. Univ. of Houston-Victoria*, 2006 WL 870432 (S.D. Tex. 2006).

Conversely, Petitioner contends that the alleged conflict over the viability of third-party retaliation claims stems from "confusion" over two issues—(1) whether third party reprisals are unlawful, and (2) whether the law authorizes third parties to obtain judicial redress. *See* Petition for Writ of Certiorari, pp. 25-26. However, the lawful or unlawful nature of third-party reprisals is not at issue in this case. Rather, this Court has already recognized that retaliation is unlawful if "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 2415 (2006) (citing *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). Thus, the sole issue before this Court is whether Petitioner, as a third party, is afforded protection under the anti-retaliation provision of Title VII, 42 U.S.C. § 2000e-3(a) based solely upon his association with an employee who has engaged in protected activity.

Petitioner then cites to dicta in a number of cases to purportedly show that an inter-circuit conflict exists. Notably, though, the very cases Petitioner cites for this premise actually support the Sixth Circuit's *en banc* decision in this case, finding no cause of action to exist under the relevant statute.[7] *See Fogleman v. Mercy*

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[7] *Elsensohn v. Parish of St. Tammany*, 2007 WL 1799684 (E.D. La. 2007) (Plaintiff who did not involve himself in wife's FMLA claim except to give her moral support did not fall under anti-retaliation provision of FMLA); *Strickland v. Aaron Rents, Inc.*, 2006 WL770578 (W.D. Tex. 2006) (retaliation claim

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Hospital, Inc., 283 F.3d 561, 568 (3rd Cir. 2002) ("[I]t is hard to imagine any clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in protected activity."); *Holt v. JTM Industries, Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996). Of the remaining cases cited by Petitioner, the bulk of them do not even reach the issue of whether a cause of action exists in this scenario. *See Rubin v. Kirkland Chrysler-Jeep, Inc.*, 2006 WL 1009338 (W.D. Wash. 2006) (Court did not reach issue of retaliation claim based solely on association because plaintiff established *prima facie* case of retaliation based on her own complaints); *Sacay v. The Research Foundation of the City University of New York*, 193 F. Supp. 2d 611, 634 (E.D.N.Y. 2002) ("This Court need not resolve the issue because [plaintiff] has raised a genuine issue of material fact that she engaged in protected activity by writing a letter on June 5, 1995 in support of her mother

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(Cont'd)
dismissed because plaintiff had not engaged in protected activity and could not rely upon protected activity of friend to support her claim); *Mutts v. Southern Connecticut State University*, 2006 WL1806179 (D.Conn. 2006) ("[T]he Court concludes that Mrs. Mutts cannot establish a *prima facie* case because she did not personally engage in any protected activity that resulted in retaliatory action."); *Horizon Holdings, L.L.C. v. Genmar Holdings, Inc.*, 241 F. Supp. 2d 1123, 1143 ("[T]he court believes that the plain text of the provision clearly prohibits only retaliation against the individual who engaged in protected activity."); *Dias v. Goodman Manufacturing Co., L.P.*, 214 S.W.3d 672 (declining to expand the class of people to whom state equivalent of Title VII applies); *Dawn L. v. Greater Johnstown School District*, 586 F. Supp. 2d 332 (W.D. Penn. 2008) (holding that only persons personally engaging in protected activity have a viable cause of action under Title IX).

and her mother's exercise of rights under the ADA."); *Millstein v. Henske*, 722 A.2d 850 (D.C. App. 1999) (holding that even if cause of action were recognized, relationship between parties was too attenuated to support claim).

Petitioner further cites decisions from the Eleventh and Seventh Circuits as being on the other side of the alleged circuit split. *See Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989); *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996). Although these cases are Title VII retaliation cases, the plaintiffs there were not "third parties." That is, the plaintiffs were not like Petitioner in this case who is not in a protected category and has not engaged in any protected activity. The alleged split amongst the circuits simply does not exist in this case.

In *Wu*, the plaintiffs were husband and wife faculty members. Both of the plaintiffs had filed a Title VII claim against their employer. Unlike Petitioner, however, who denied having engaged in any protected activity on behalf of his fianceé, and who was not otherwise in a protected category, the husband and wife plaintiffs in *Wu* alleged the following in their joint Complaint:

> [T]he defendants have violated the rights of the plaintiffs under [42] U.S.C. § 2000e and 42 U.S.C. § 1983 by unlawfully retaliating against plaintiffs ***because they have made civil rights complaints against the defendants*** and ***because they have sought to enforce Title VII*** of the Civil Rights Act of 1964 and the Equal Pay Act of 1963.

Id. at 1549 (emphasis added). Thus, both of the plaintiffs in *Wu* had engaged in protected activity. Neither of the *Wu* plaintiffs alleged employer retaliation solely because of their relationship with the other. That narrow issue — whether Title VII's anti-retaliation provision protects third-parties from retaliation based solely upon the plaintiff's relationship—was not before the Eleventh Circuit Court of Appeals.

Likewise, Petitioner's contention that the Seventh Circuit Court Appeals allowed third-party retaliation claims in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), does not accurately reflect the Seventh Circuit's decision in that case. The plaintiff in *McDonnell* had not filed a charge of discrimination, but he, contrary to his employer's wishes, had failed to prevent employees under his supervision from filing charges against the employer. The plaintiff was discharged for this failure.

The Court did not, as urged by Petitioner in this case, find that the supervisor was entitled to protection under the statute based solely upon his association with those whom he supervised and who filed the charges of discrimination. Rather, the Court found that the plaintiff had engaged in protected activity when he supported the other employees in pursuing their Title VII claims. That is, the supervisor could have otherwise prevented or impaired their ability to make the charge, but affirmatively chose not to do so. Thus, the Court held that while the plaintiff's assistance to his co-workers was passive, his assistance nonetheless constituted protected activity. Petitioner, on the other hand, admittedly engaged in no protected activity—either passive or active. He alleged that he was terminated

solely based upon his relationship with Regalado, not based upon something he did or did not do that in some manner related to Regalado's discrimination claim against NAS.

Petitioner further claims that subsequent Seventh and Fourth Circuit cases, as well as a number of district court cases, have relied on these decisions as establishing the viability of such third-party claims.[8] However, these subsequent cases do not stand for the premise Petitioner claims they do. In *Drake*, the Court stated that it was simply *assuming*, for summary judgment purposes, that the plaintiff was protected from retaliation based on her husband's protected activities. *Drake*, 134 F.3d at 886. In fact, the district court in *Whittaker* specifically noted that, "The Seventh Circuit, however, *has assumed, though it has not specifically held*, that an employee is protected from retaliation under Title VII based on the protected activities of that employee's spouse." *Whittaker*, 2003 WL 21403520 at *1 (emphasis added). The Fourth Circuit did not explicitly recognize third-party claims in *Iturbe*, either. Rather, the Court disposed of that case when it noted that the plaintiff's retaliation claim "misse[d] the mark," because he could not show a causal connection between

[8] *See Drake v. Minnesota Mining & Manufacturing Co.*, 134 F.3d 878 (7th Cir. 1998); *Iturbe v. Wandel & Golterman Technologies, Inc*, 1994 WL 118103 (4th Cir. 1994); *Whittaker v. Northern Illinois University*, 2003 WL 21403520 (N.D. Ill. 2003); *Riley v. UOP, LLC*, 244 F. Supp. 2d 928 (N.D.Ill. 2003); *Reiter v. Metropolitan Transportation Authority of the State of New York*, 2002 WL 31190167 (S.D. N.Y. 2002); *Murphy v Cadillac Rubber & Plastics, Inc.*, 946 F. Supp. 1108 (W.D. N.Y. 1996).

his wife's EEOC claim and his transfer to a different position. *Iturbe*, 1994 WL 118103 at *5.

A number of the remaining cases that Petitioner claims purportedly rely on *Wu* to recognize third-party retaliation claims are also readily distinguishable. The plaintiff in *Riley* did not even make a retaliation claim, and thus the district court found *Wu* to be inapplicable. *Riley*, 244 F. Supp. 2d at 940. In actuality, the plaintiff there alleged that she was discriminated against on account of her race, sex, and age. *Id.* In *Reiter*, the Court never reached the issue of whether the third-party retaliation claim was viable. Whether or not the plaintiff could assert such a claim, the Court noted, no reasonable juror could find that he was retaliated against because of his wife's protected activities. *Reiter*, 2002 WL 31190167 at *8. Finally, *Murphy* is factually distinguishable because the plaintiff there alleged that he assisted and supported his wife in her complaints of discrimination, and that the defendants knew of his assistance. *Murphy*, 946 F. Supp. at 1113. Thus, the plaintiff there had himself engaged in protected activity. Conversely, Petitioner is asserting retaliation based solely upon his relationship with Regalado, not because he himself engaged in any protected activity.

Contrary to Petitioner's assertions, *no circuit* has held that a cause of action exists under § 2000e-3(a) when the plaintiff has not personally engaged in any of the protected activities set forth in the statute. The cases upon which Petitioner relies to demonstrate the purported split are factually distinguishable and simply do not address the narrow issue of whether § 2000e-3(a) protects third parties from retaliation based solely

upon his association with another. In actuality, all of the circuits which have addressed this issue have rejected such claims. Thus, contrary to Petitioner's contention, no inter-circuit conflict exists to justify granting the Petition.

II. The Title VII Anti-Retaliation Statute is Unambiguous and Requires No Statutory Interpretation.

Not only is there no inter-circuit conflict to support disturbance of the Sixth Circuit's *en banc* decision, but there is also no important question of federal law to be decided by this Court. Rather, the *en banc* Sixth Circuit properly recognized that § 2000e-3(a) is unambiguous and must be applied as written. As set forth below, this holding is amply supported by the rules of statutory construction as well as the holdings of the other circuits that have ruled on this narrow issue.

A. Rules of Statutory Construction.

This Court recently emphasized the following fundamental principle of statutory construction which was properly applied in this case by the Sixth Circuit:

> We have "stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 117 L.Ed.2d 391 (1992). When the statutory "language is plain, the sole function of the courts—at least where the disposition

> required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000).

Arlington Central Sch. Dist. Bd. of Education v. Murphy, 548 U.S. 291, 296, 126 S.Ct. 2455, 2459 (2006). The beginning point of a court's examination is the statute and the language chosen by Congress:

> [W]ith any question of statutory construction, [the court] must first look to the language of the statute itself. [internal citations omitted]. If the language of the statute is clear, then the inquiry is complete, and the court should look no further. Only if the statute is 'inescapably ambiguous' should a court look to other persuasive authority in an attempt to discern legislative meaning.

See Brilliance Audio, Inc. v. Haights Cross Communications, 474 F.3d 365, 371-72 (6th Cir. 2005). As set forth below, there is nothing "absurd," as Petitioner claims, about applying the anti-retaliation provision as written so that it only protects those persons who themselves oppose unlawful behavior. While this statute may not reach as far as desired by Petitioner, the anti-retaliation provision of Title VII is not "inescapably ambiguous."

B. Plain Language of Anti-Retaliation Provision

The anti-retaliation provision of Title VII provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a).

There can be little dispute that on the face of the statute no protection is afforded to third-parties. The *en banc* Sixth Circuit recognized that:

> By application of the plain language of the statute, Thompson is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice, make a charge, testify, assist, or participate in an investigation.

Thompson v. North American Stainless, LP, 567 F.3d 804, 808 (6th Cir. 2009). In short, as written, the anti-retaliation provision of the statute only affords protection to individuals who have taken some action which could be construed as supporting the anti-discrimination provisions of Title VII. Congress used

the words "opposed any practice," "made a charge," "testified," "assisted" or "participated in any manner" in the statute, choosing action words, not words of association. *See Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 63, 126 S.Ct. 2405, 2412 (2006) (The "anti-retaliation provision seeks to prevent harm to individuals based on what they do, i.e. their conduct."). Given the conclusion that the anti-retaliation provision seeks to prevent harm based upon an employee's conduct, Petitioner's contention that Congress intended the anti-retaliation provision to provide a cause of action to employees who have not engaged in the conduct referenced by the statute is without merit. Congress went into significant detail to describe the types of conduct that would be included, which would not have been necessary if an employee had a viable cause of action without engaging in such conduct.

Petitioner incredulously claims that, because nothing in § 2000e-3(a) explicitly excludes from prohibition the use of third party reprisals, they must necessarily be included. However, such logic was recently rejected by this Court. *See Dean v. United States*, __ U.S. __, 129 S.Ct. 1849, 1853 (2009) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."). This Court similarly refused to insert additional words or requirements into § 2000e-3(a) in *Burlington Northern*. Rather, this Court determined that the anti-retaliation provision must be enforced *as written*.

Petitioner further argues that this Court's decision in *Burlington Northern* requires the Court to add a

classification of persons to the anti-retaliation statute. This claim is based on the assumption that enforcing the statute as written would purportedly frustrate the purpose of the statute—"unfettered access to statutory remedial mechanisms." *Burlington*, 548 U.S. at 64, 126 S.Ct. at 2412 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 117 S.Ct. 843 (1997)). The *en banc* Sixth Circuit explicitly rejected this contention, noting that, "The plain text simply cannot be read to encompass 'piggyback' protection of employees like Thompson, who by his own admission, did not engage in protected activity, but who is merely associated with another employee who did oppose an allegedly unlawful employment practice." *Thompson*, 567 F.3d at 816.

While expanding coverage may foster the remedial purpose of the statute, that reason is not sufficient for this Court to defy the rule of statutory construction that a court's obligation is to enforce the statute according to its terms. *See Arlington Central*, 548 U.S. at 296, 126 S.Ct. at 2459. In *Rodriguez v. United States*, 480 U.S. 522 107 S.Ct. 1391 (1987), this Court further noted that:

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, 'the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the

> additional considerations of 'policy' . . . that may have influenced the lawmakers in their formulation of the statute.'

Id. at 526, 1393 (quoting *Aaron v. SEC*, 446 U.S. 680, 695, 100 S.Ct. 1945, 1954 (1980)). *See also Commissioner of Internal Revenue v. Asphalt Products, Inc.*, 482 U.S. 117, 121, 107 S.Ct. 2275, 2278 (1987) ("Judicial perception that a particular result would be unreasonable . . . cannot justify disregard of what Congress has plainly and intentionally provided."). There is simply no support for the proposition that a statute should be expanded beyond what it expressly states for no reason other than that doing so may foster the purpose of the statute. Under the circumstances of this case, broadening the scope for the purpose of effectuating the remedial purpose of Title VII will lead to uncertainty regarding which third parties receive protection, as further discussed in Section III below.

In fact, *Burlington Northern* actually supports the Sixth Circuit's conclusion and the statutory interpretation arguments set forth above. In that case, this Court compared the language of the substantive Title VII provision, 42 U.S.C. § 2000e-2, with the language in the anti-retaliation provision, 42 U.S.C. § 2000e-3. *Id.* at 61-62, 2411. Applying statutory construction principles, this Court carefully examined the statute and determined that Congress had taken great care in drafting the language of this statute and that the Court should "presume" that Congress had drafted the statute as written "intentionally and purposely." *Id.* at 62, 2412.

Thus, if the Court presumes that Congress intentionally and purposefully drafted the statute, then there is no conclusion to reach other than Petitioner, who did not engage in any "opposition" as set forth in the statute on behalf of his fiancée, cannot pursue this anti-retaliation cause of action. In this case, it is undisputed that Petitioner did not engage in any conduct identified by the anti-retaliation provision. None of the anti-retaliation provision's action words fit Petitioner's situation. His attempt to rely upon *Burlington Northern* as a means to expand the plain wording of the statute to include his claim should be rejected. As in *Burlington Northern*, the statute should be applied as written.

Lastly, while all of the other circuits which have had occasion to rule on this specific issue have recognized that allowing the third-party claims "presents a conflict between a statute's plain meaning and its general policy objectives," each circuit nonetheless found that the plain language of the statute could not be ignored. *Fogleman*, 283 F.3d at 569. In *Holt*, the Fifth Circuit Court of Appeals held that while allowing such claims "might eliminate the risk that an employer will retaliate against an employee for their spouse's protected activities" it would "contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation." 89 F.3d at 1226. Likewise, the Eighth Circuit Court of Appeals in *Smith* held that "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for assisting or participating in any manner in a proceeding under Title VII." *Smith*, 151 F.3d at 819. Thus, the court determined "that a plaintiff

bringing a retaliation claim under Title VII must establish that she personally engaged in the protected conduct." *Id.* Finally, in *Fogleman*, the Third Circuit Court of Appeals stated that "[r]ead literally, the statutes are unambiguous—indeed, it is hard to imagine a clearer way of specifying that the individual who was discriminated against must also be the individual who engaged in the protected activity." *Fogleman*, 283 F.3d at 568. The Third Circuit recognized that there were protections built into the anti-retaliation provision which avoided the "dire results" suggested by Petitioner here. *Id.* at 570.

The Sixth Circuit was correct in holding that Petitioner did not assert a proper cause of action under § 2000e-3(a) in this case. In order to establish a Title VII retaliation claim, a plaintiff must first prove that he engaged in protected activity as set forth in the statute. *See Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 412 (6th Cir. 2008). Petitioner does not allege that he engaged in any protected activity either for himself or on behalf of his fiancée, and therefore, does not satisfy the criteria for protection. The plain language of § 2000e-3(a) limits the class of persons who may sue for retaliation to those who have engaged in the enumerated activities. By his own admission, Petitioner is not included in this class of persons.

C. Other Statutes Specifically Protect Associations, But Title VII Does Not.

There can be no doubt that Congress is cognizant of discrimination based upon third-party associations. The Americans with Disabilities Act specifically defines "discrimination" to include "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). *See also* 29 C.F.R. § 1630.8 (providing that "[i]t is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association."). Similarly, the Whistleblower Protection Act specifically provides that one who has authority over personnel actions shall not "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of any disclosure of information by an employee or applicant. . . ." 5 U.S.C. § 2302(b)(8). Thus, protection under that statute is afforded to any employee based on any other employee's disclosure—it is not limited to actions against the employee making the disclosure.

Petitioner devotes a substantial portion of his Petition to comparisons between Title VII and the National Labor Relations Act ("NLRA"), under which some courts have recognized third-party retaliation claims. However, the Third Circuit pointed out the key difference between the NLRA and statutes similar to

Title VII in *Fogleman*. While the Court, relying on Title VII precedent, held that the plaintiff did not have a cause of action under the ADEA, it did find that the ADA contained additional language similar to that of the NLRA which provided the plaintiff with a valid cause of action. *Folegman*, 283 F.3d at 564. Specifically, both the ADA and the NLRA make it unlawful for an employer "to coerce, intimidate, threaten, or interfere with any individual" exercising rights under the respective Act. *See* § 42 U.S.C. 12203(b); 29 U.S.C. § 158(a)(1). Thus, the Court found that such third-party retaliation claims were only cognizable under the additional language of the ADA and the NLRA, which Title VII does not contain.

Title VII's anti-retaliation provision only protects those persons who have themselves undertaken some protected activity. Thus, there is a fundamental difference between the protection afforded by the anti-retaliation provisions of the preceding statutes and Title VII. *See General Electric Co. v. Southern Construction Co.*, 383 F.2d 135, 139 n. 4 (5th Cir. 1967) ("Where a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute is significant to show a different intention existed."); *United States v. Azeem*, 946 F.2d 13, 17 (2nd Cir. 1991) ("In general, congressional consideration of an issue in one context, but another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated."). If Congress had intended to allow third-party retaliation claims under Title VII, it certainly knew how to do so. The fact that Congress did not include these claims in Title VII demonstrates its intention that such claims not be recognized.

D. Petitioner Mischaracterizes the Issue as One of Standing Rather Than a Cause of Action.

Petitioner erroneously mischaracterizes the issue of whether he has a cause of action under § 2000e-3(a) by injecting unrelated arguments concerning standing under § 2000e-5(f)(1). Essentially, he argues that because he is "aggrieved" pursuant to § 2000e-5(f)(1), he therefore has a cause of action. However, this Court recognized the difference between being "aggrieved," and thus having standing, and having a viable cause of action in *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264 (1979). To demonstrate standing, a plaintiff must simply show that he "'personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.'" *Id.* at 239, 2274 n.18 (*quoting Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608 (1979)). Whether one is "aggrieved" under § 2000e-5(f)(1) is a question of standing, not whether he has a cause of action. *Leibovitz v. New York City Transit Authority*, 252 F.3d 179, 185 (2nd Cir. 2001). *See also Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976) ("Whether Waters has standing to sue . . . depends on whether she is a 'person claiming to be aggrieved'"). Thus, the fact that Petitioner may be "aggrieved" under § 2000e-5(f)(1) is not dispositive of whether he has a cause of action under § 2000e-3(a).

Whether one has a cause of action "depends not on the quality or extent of the injury, but on whether the class of litigants of which he is a member may use the courts to enforce the right at issue. The focus must therefore be on the nature of the right he asserts." *Davis*, 442 U.S. at 239, 99 S.Ct. at 2274 n.18. This Court further noted in *National Railroad Passenger Corp. v.*

National Association of Railroad Passengers, 414 U.S. 453, 456, 94 S.Ct. 690, 692 (1974), that the threshold question to be determined is whether a cause of action exists. If no cause of action is found to exist, questions of standing become immaterial. *Id.* at 465, 696 n.13. *See also Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 492, 102 S.Ct. 752, 769 (1982) (Brennan, J., dissenting)[9]

The *en banc* Sixth Circuit correctly recognized that Petitioner's standing under § 2000e-5(f)(1) was a distinct and separate issue from whether he had a viable cause of action under § 2000e-3(a). Petitioner claims that, because the Sixth Circuit did not address his standing to sue, it adopted a different interpretation from the Courts in *Holt, Smith, and Fogleman.* However, a cursory reading of the *en banc* opinion proves otherwise. Because the Sixth Circuit determined that Petitioner did not have a valid cause of action, it rightfully did not reach the issue of whether he had standing to pursue his claim.[10]

---

[9] "The Court makes a fundamental mistake when it determines that a plaintiff has failed to satisfy the two-pronged 'injury-in-fact' test, or indeed any other test of 'standing,' without first determining whether the Constitution or a statute defines injury, and creates a cause of action for redress of that injury, in precisely the circumstances presented to the Court."

Valley Forge, 454 U.S. at 492, 769.

[10] The Sixth Circuit did acknowledge in a footnote, though, that it was satisfied that he met the minimum standing requirements for a Title VII claim and that NAS did not challenge Petitioner's standing as an "aggrieved" person under § 2000e-5(f)(1). *See Thompson v. North American Stainless, LP*, 567 F.3d 804, 809 n.1. (6th Cir. 2009).

III. Petitioner's Public Policy Arguments Are Not Good Grounds for Reversing the Sixth Circuit's Decision.

A. Petitioner's Unfounded Concerns

In a final attempt to convince this Court to grant his Petition, Petitioner makes a number of specious predictions about the potential ramifications of this case. First, he claims that, while the Sixth Circuit's decision leaves open the possibility that the employee who engaged in protected activity (Regalado, in this case) could sue on behalf of the third party (Petitioner here), the Fourth Circuit has allegedly foreclosed upon that possibility. *See Smith v. Frye*, 488 F.3d 263 (4th Cir. 2007). Second, Petitioner predicts that the EEOC will either have to warn employee witnesses that their cooperation may lead to reprisals, possibly deterring those witnesses from actually cooperating, or deliberately withholding that information from the witnesses, and having them potentially face consequences from their employer. However, such allegedly dire results are not certain to occur and should not be considered by this Court.

It is important to remember that the plaintiff in this case is the Petitioner, Eric Thompson, and not Miriam Regalado. The Sixth Circuit was not faced with a claim brought by Regalado on behalf of Thompson, nor is this Court faced with such a claim. Speculation about the viability of a claim brought by the employee who engaged in protected activity on behalf of a third party, or the

effect of a decision in this case on such claims in the future, is improper and would be tantamount to an advisory opinion. *See Princeton University v. Schmid*, 455 U.S. 100, 102, 102 S.Ct. 867, 869 (1982) ("We do not sit to decide hypothetical issues or to give advisory opinions"); *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 2334 (1975) (holding that federal court judgments "must resolve a real and substantial controversy . . . as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 461, 65 S.Ct. 1384, 1389 (1945) ("This Court is without power to give advisory opinions . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions"). Further, entertaining these hypothetical issues would constitute a waste of judicial resources, an abuse of the role of the judiciary, and interference with the other branches of government. *National Advertising Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005). In short, this Court should not concern itself with Petitioner's "what-ifs."

Further, *Smith v. Frye* is distinguishable from the facts of the instant action. In that case, a circuit court employee was discharged after her son, *who was not a circuit court employee at the time*, decided to run for circuit court clerk against the incumbent clerk. The Fourth Circuit held that the mother did not have a viable cause of action because she herself had not engaged in any protected activity, such as supporting

her son's campaign. *Smith*, 488 F.3d at 270-271. Moreover, the Court determined that the son did not have a cause of action, either because of the adverse employment action against his mother or for his own alleged emotional distress due to her discharge. *Id.* at 273-274. The Court's rationale for dismissal of their claims is clear. With respect to the mother, she, like Petitioner here, had not engaged in any sort of protected activity on behalf of herself or her son. As her son was not an employee of the circuit court at the time, he had not personally suffered any adverse employment action.

Petitioner's second alleged concern about the cooperation of witnesses with EEOC investigations was squarely addressed by this Court in its recent decision in *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, __ U.S. __, 129 S.Ct. 846 (2009). Not only does § 2000e-3(a) protect employees who "made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing", but this Court further recognized in *Crawford* that the opposition clause extended to an employee who involuntarily answered questions during an employer's investigation into a co-worker's complaints. Thus, an employee who participates in an EEOC investigation, even involuntarily, is protected by § 2000e-3(a). Petitioner's contentions are without merit.

B. Chaos Will Ensue in the Workplace and in the Courts if Petitioner Prevails.

On the other hand, the granting of the Petition in this case and the reversal of all of the circuits having ruled on this issue will create an environment of chaos in both the courts and the workplace. The Sixth Circuit's *en banc* holding and those of the other circuits ruling on this issue eliminate the necessity that courts will be required to determine what classifications of parties are entitled to third-party protection and the Pandora's box associated with leaving that issue open for judicial determination. Applying the statute as written will also foster and promote reporting discrimination in the workplace, and demonstrate compliance with the maxim *expressio unius est exclusio alterius*.

The rationale offered by Petitioner of providing third-party protection is to limit the situations where an employee will be afraid to voice his complaint of discrimination if the employee fears that someone whom the employee cares about—a spouse, fiancé, relative or friend—will suffer the wrath of the employer. However, the Petitioner does not speculate as to the extent of this protection, how courts would go about determining whether the relationship qualifies for third-party protection, or whether it is a legal question or one for the jury to decide. This uncertainty will necessarily result in excessive side bar litigation over what types of relationships should be entitled to protection. This concern was recognized in *E.E.O.C. v. Bojangles Restaurant*, 284 F. Supp. 2d 320 (M.D. N.C. 2003), in which the Court predicted that, "[t]he number of

lawsuits which could spawn from this rule could be enormous in a company of any size." *Id.* at 326.

Under Petitioner's logic, married employees would likely be granted automatic standing for third-party reprisal claims. That protection, however, leads to the question of whether employees who live together as husband and wife, but who have never been married, will be entitled to that same protection and, whether a state's recognition of common law marriages will be determinative of that issue. The same issues may arise in regard to same-sex relationships because some states recognize same-sex marriages and some do not. This deficiency leaves the decision to the courts to be decided piecemeal on a case by case basis, which leaves room for inconsistent standards in different circuits. Differences in opinion will undoubtedly arise over which relationships should be afforded protection. Some associations may be easy—parent/child, husband/wife, sister/brother—but, undoubtedly, there will be other relationships that are less clear—friends/ divorced couples/ former friends/ acquaintances/ cousins/ distant relatives. Further differences will arise over the varying state laws that may apply to the specific situation, as noted above.

Moreover, the lack of guidance will cause uncertainty for employers. As reflected in the Associations of Manufacturers and Chambers of Commerce amici briefs filed with the Sixth Circuit on behalf of NAS, this uncertainty will, as a practical matter, have a negative impact upon an employer's ability or willingness to issue needed disciplinary actions against employees for fear of Title VII litigation. *See* Brief of the Equal

Employment Advisory Council, National Association of Manufacturers, and Kentucky Association of Manufacturers as Amici Curiae in Support of NAS, p. 12; Brief of Chamber of Commerce of the United States of America and Kentucky Chamber of Commerce as Amici Curiae in Support of NAS, p. 11. It is a reality in employment practices that an employee who takes any steps set forth in the anti-retaliation statute, as a practical matter, is no longer "at will" and is subject only to termination for cause. Once an employee comes forward to voice a complaint, the employee is entitled to automatic job protection. Thus, in the real world it is not uncommon for an employee who faces legitimate disciplinary action by an employer to seek protection from such discipline by alleging discrimination. If this Court were to accept Petitioner's proposed expansion of the statute, employees who otherwise would be subject to disciplinary actions and should be disciplined will likely seek protection by claiming protection as a "third-party." Thus, judicial creation of a third-party protection claim under the anti-retaliation provision of Title VII will create legitimate practical problems for employers who need to implement legal and necessary discipline in the workplace. *See Hill v. St. Louis University*, 123 F.3d 1114, 1120 (8th Cir. 1997) (noting that Title VII is not meant to transform "at will" employment into perpetual employment); Brief of Chamber of Commerce of the United States of America and Kentucky Chamber of Commerce as Amici Curiae in Support of NAS, p. 9.

To impose such discipline, employers would also be required to speculate about the possible relationships an employee may have that could give rise to potential liability each time they contemplated disciplinary or

other action against that employee. *See* Brief of the Equal Employment Advisory Council, National Association of Manufacturers, and Kentucky Association of Manufacturers as Amici Curiae in Support of NAS, p. 12. Of course, these relationships often change over time, further requiring the employer to "map the web of associations among all employees". Brief of Chamber of Commerce of the United States of America and Kentucky Chamber of Commerce as Amici Curiae in Support of NAS, p. 12. Additionally, it would be difficult for the employer to discern whether the relationship or association argument asserted by the employee was made in good faith. Frivolous claims would certainly increase in the absence of such identifiable screening criteria.

The anti-retaliation provision, as written, specifically describes those persons who are entitled to protection under the statute, *i.e.* those who have opposed the employer's unlawful employment practices and those who have made a charge, testified, assisted or participated in a Title VII investigation, proceeding or hearing. 42 U.S.C. § 2000e-3(a). Thus, the statute objectively identifies the criteria necessary for protection. This Court noted in *Burlington Northern* that:

> An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings. We have emphasized the need for objective standards in other Title VII contexts, and those same concerns animate our decision here.

548 U.S. at 68-69, 126 S.Ct. at 2415. Comparably, there are no criteria in the statute, and Petitioner does not suggest any, to guide courts on the level of association between protected parties and third parties necessary to receive protection. Any such criteria would be highly subjective at best.

The anti-retaliation provision of Title VII, on its face, affords protection to those employees who merely "assist" "in any manner." Petitioner, and other third-parties like him, could easily obtain protection under the statute by simply assisting a third-party. Thus, the effort required to obtain protection under the statute is quite minimal. It is reasonable and not "absurd," as alleged, to find that Congress anticipated the potential problems described above and determined that those problems outweigh placing a minimal burden on the party seeking protection. Imposing this minimal burden upon plaintiffs does not frustrate the remedial goal of this statute, but, in fact, fosters it by encouraging employees to seek protection by speaking out against discriminatory practices.

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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REPLY BRIEF

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ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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Title VII, 1964 Civil Rights Act ..... *passim*

I. INTRODUCTION

The decision of the Sixth Circuit turned on two inter-related questions of law:

> (1) whether section 704(a) forbids an employer to inflict reprisals on an employee's relative or fiancé as a method of retaliating against the employee for protected activity,[1] and
>
> (2) whether that prohibition can be enforced in an action for redress by the injured third party.[2]

Those are the questions presented by the petition.

Respondent devotes much of its brief in opposition to a quite different question – whether merely associating with a person who has complained about discrimination is itself a form of activity protected by section 704(a).[3] But that is not the issue which divided the Sixth Circuit, and it is not the question presented by the petition in this Court. Petitioner does not contend that he engaged in protected activity by associating with his then fiancé. Rather, petitioner argues – as did the dissenting

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[1] Pet. App. 29a (Rogers, J., concurring); see Pet. App. 40a, 42a n.4, 43-44a (Moore, J., dissenting), 53a, 54a n.1, 57a (White, J., dissenting).

[2] Pet. App. 30a-33a (Rogers, J., concurring), 42a-43a, 50a-53a (Moore, J. dissenting), 57a-62a (White, J., dissenting).

[3] Br. Opp. i, 7, 8, 10, 15, 19, 20, 24.

judges (and, as to the first issue, the concurring judge) – that Title VII forbids an employer to inflict reprisals on a third party as a *method* of retaliating against a worker who has engaged in protected activity, and that Title VII authorizes that third party to obtain judicial redress for such a reprisal.

II. THE LOWER COURTS ARE DIVIDED REGARDING WHETHER REPRISALS AGAINST THIRD PARTIES ARE UNLAWFUL AND ACTIONABLE

(1) With regard to whether Title VII (and other federal employment laws) permits an employer to retaliate against a worker who complained about discrimination by inflicting reprisals on a family member or other third party, respondent states:

> [T]he lawful or unlawful nature of third-party reprisals is not at issue in this case. Rather, this Court has already recognized that retaliation is unlawful if "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 ... (2006).

(Br. Opp. 10). Whether such reprisals are lawful or unlawful, however, was very much at the center of the dispute in the Sixth Circuit. That issue was a key

element of the dissenting opinions and of Judge Rogers' concurring opinion.

Respondent appears to defend the Sixth Circuit decision on the ground that reprisals against third parties are lawful. The text of section 704(a), respondent objects, does not include an express "prohibition [against] the use of third party reprisals." (Br. Opp. 19). A ban on such reprisals, respondent asserts, would be impossible to administer, and would lead to "chaos ... in the workplace." (Br. Opp. 31 (capitalization omitted); see *id.* at 31-34). But if, as respondent appears to suggest, the Sixth Circuit decision holds that reprisals against third parties are actually a lawful method of retaliation, that decision clearly conflicts with decisions in several other circuits. (Petition 26-32).

Respondent seeks to distinguish the Eleventh Circuit decision in *Wu v. Thomas*, 863 F.2d 1543 (11th Cir. 1989), arguing that the third-party victim in that case (Mr. Wu) had himself engaged in protected activity. Respondent relies on a passage in the complaint (filed by both Mr. Wu and his wife) alleging retaliation "because they have made a civil rights complaint against the defendant." (Br. Opp. 12 (quoting *Wu*, 863 F.2d at 1549)). However, a closer reading of the opinion makes clear that there actually was no claim that Mr. Wu had made any such complaint. While his wife had filed one internal complaint, three EEOC charges, and one lawsuit against the defendant, Mr. Wu had never taken any such actions. The Eleventh Circuit overturned the

dismissal of Mr. Wu's claim, not because he had engaged in any protected activity (which he had not), but because of his wife's EEOC charge, which alleged "retaliation [against her] ... based on the university's actions toward her husband." 863 F.2d at 1548.

Respondent correctly notes that in *McDonnell v. Cisneros*, 84 F.3d 256 (7th Cir. 1996), the plaintiff himself had engaged in protected activity. But the interpretation of section 704(a) in *McDonnell* is emphatically not restricted to such cases. Rather, the Seventh Circuit's opinion expressly holds that the protections of section 704(a) also extend to reprisals against individuals whom the employer knows did not engage in protected activity, such as the infliction of "collective punishment." 84 F.3d at 262.

To support its contention that the decision of the Sixth Circuit in this case is "in accord with all other circuits having occasion to rule on the same specific issue" (Br. Opp. 8), respondent argues that "[t]he majority of federal courts who have considered the result of third-party causes of action have refused to recognize such claims as valid causes of action under federal anti-retaliation laws." (Br. Opp. 9). Respondent relies in particular on the Third Circuit decision in *Fogelman v. Mercy Hospital*, 283 F.3d 561, 558-60 (3d Cir. 2002), which construed the anti-retaliation provisions in the Age Discrimination in Employment Act and in section 503(a) of the Americans With Disabilities Act, and the Fifth Circuit decision in *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir. 1996), also interpreting the ADEA. (Br. Opp. 9, 10-11, 22).

Respondent simply ignores, however, the contrary construction of several other federal anti-retaliation statutes: the Occupational Safety and Health Act, the Equal Pay Act, and the Employee Retirement Income Security Act. (Petition 28-29). The courts of appeals are in fact sharply divided as to whether federal anti-retaliation laws forbid reprisals against third parties; a majority of the decisions actually conclude that that form of retaliation is unlawful.

The decisions in the Third, Seventh and District of Columbia Circuits holding third-party reprisals unlawful under the National Labor Relations Act are particularly significant. (Petition 26-28). Respondent suggests that the interpretation of the NLRA should be ignored because the language of the anti-retaliation provision of the NLRA is somewhat different than the terms of section 704(a). (Br. Opp. 25). But in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), this Court expressly relied on the interpretation of the NLRA in construing section 704(a). The Court pointed out that it had "drawn analogies [to the NLRA] ... in other Title VII contexts." 548 U.S. at 66 (quoting *Hishon v. King & Spaulding*, 467 U.S. 69, 76 n.8 (1984)). *Burlington Northern*, clearly referring to Title VII and the NLRA, observed that "Congress has provided similar kinds of protection from retaliation in comparable statutes." 548 U.S. at 66. The NLRA is especially important because in 1962, before Congress relied on the NLRA in framing Title VII, the National

Labor Relations Board had already construed the NLRA to forbid reprisals against third-parties. *Golub Bros. Concessions*, 140 NLRB 120 (1962).

(2) Section 706(f)(1) provides that "a civil action may be brought ... by the person claiming to be aggrieved." The six dissenting members of the Sixth Circuit reasoned that a third-party reprisal victim is "aggrieved" within the meaning of section 706(f)(1), and therefore is authorized to bring a Title VII suit. (Pet. App. 50-53, 58-60). That broad interpretation of section 706(f)(1) is followed by the Third, Seventh, Eighth and District of Columbia Circuits. (Petition 35). In a concurring opinion, Judge Rogers contended that a third-party reprisal victim is not "aggrieved" under section 706(f)(1), and thus cannot maintain an action under Title VII. (Pet. App. 30a-33a). That is the construction of section 706(f)(1) adopted by the Fifth Circuit in *Holt v. JTM Industries*, 89 F.3d 1224 (5th Cir. 1996).

The en banc majority rejected both of these lines of cases. On the one hand, the majority expressly disapproved of *Holt*, and acknowledged that Thompson was "aggrieved" within the meaning of section 706(f)(1). (Pet. App. 9a-10a n.1, 13a n.4). On the other hand, the en banc court held that merely being a "person ... aggrieved" is not sufficient to authorize an individual to bring a claim under Title VII. The decisions in the Third, Seventh, Eighth and District of Columbia Circuits, however, recognize no additional requirement. As the District of Columbia Circuit explained:

> Congress specifically permitted any "person claiming to be aggrieved" by an unlawful employment practice to file suit.... This language, we have held, opens the courts to "anyone who satisfies the constitutional requirements." *Gray v. Greyhound Lines*, 542 F.2d 169, 176 (D.C.Cir. 1976).... Accordingly, if the council can back up its allegations of Article III standing with actual proof, it has a cause of action under Title VII.

Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp., 28 F.3d 1268, 1278 (D.C.Cir. 1994)

(3) Respondent correctly characterizes the Sixth Circuit opinion as holding that Title VII does not accord a "cause of action" to a third-party who is punished as a means of retaliating against someone else.[4] Despite the fact (or, perhaps, assuming arguendo) that Title VII forbids such reprisals, and that a third-party victim is a "person aggrieved" authorized to sue under section 706(f), the Sixth Circuit insists that there is a third, additional requirement – the existence of a cause of action – which is not met in this case. Whether a plaintiff has a cause of action under Title VII, or any other statute, turns on whether he or she "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." (Pet.

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[4] Br. Opp. 5, 6, 9, 10, 15, 18, 19, 22, 23, 25, 26, 27.

App. 9a (quoting *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979)).

But the question of which class of litigants may invoke the power of the court to enforce Title VII is squarely answered by section 706(f)(1), which states that "a civil action may be brought ... by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(1) creates the cause of action to "invoke the power of the court," and defines who may do so. Once a plaintiff establishes that he or she is "aggrieved" within the meaning of section 706(f)(1), the inquiry envisioned by *Davis v. Passman* is at an end. The courts are not at liberty to engraft additional requirements onto section 706(f)(1), or to accord the cause of action created by that provision only to some but not all "person[s] ... aggrieved."

The Sixth Circuit's additional "cause of action" requirement emphatically is not "in accord" with every, or indeed any, other circuit. The District of Columbia Circuit in *Fair Employment Council* expressly (and correctly) held that Title VII provides a cause of action to any person who is aggrieved within the meaning of section 706(a)(1) and who has constitutional standing. Respondent suggests that the Third, Fifth and Eighth Courts of Appeals rejected claims of third-party victims on the ground that such plaintiffs lack a "cause of action." (Br. Opp. 9, 10). That simply is not correct. The decisions in the Third and Eighth Circuits held that this form of retaliation is lawful (thus precluding any inquiry as to who could enforce such a prohibition if it existed) and the

decision in the Fifth Circuit held that third-party victims do not have standing to sue under Title VII (an interpretation which respondent and the Sixth Circuit expressly disavow). The phrase "cause of action" never appears in the Fifth and Eighth Circuit decisions, and is absent from the Third Circuit's analysis of the claim which it rejected.

III. THE DECISION OF THE SIXTH CIRCUIT IS CLEARLY INCORRECT

Respondent insists with great fervor that the terms of Title VII are "unambiguous," and that the "plain text" of the statute precludes the claim in this case.[5] But respondent makes little effort to explain how the text of the statute actually supports the decision of the court of appeals.

Respondent suggests that reprisals against third parties are lawful under section 704(a) because section 704(a) does not specifically list that particular method of retaliating against individuals who engage in protected activity. (Br. Opp. 19). But section 704(a) does not contain an arguably exclusive list of the forbidden types of retaliation; indeed, it does not mention any specific methods at all. What the statute forbids is "discriminat[ion]" against a person who engages in protected activity, a term that encompasses any adverse treatment of the protected individual not

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[5] Br. Opp. 7, 16, 19, 22, 23, 29.

inflicted on others. An employer who fires the family members or fiancé of a worker who engaged in protected activity, but takes no similar actions against the family members or fiancés of other employees, is engaging in discrimination. The limitation suggested by respondent on the methods of retaliation forbidden by section 704(a) finds no support whatever in the text of the statute.

Section 706(f)(1) spells out with crystal clarity the individuals who are authorized to file suit under Title VII – those who are "aggrieved" by the asserted violation. Neither respondent nor the court of appeals denied that the terms of that provision are satisfied when a worker, as part of a scheme to retaliate against a family member or fiancé, is fired.

The court of appeals asserted that the text of section 704(a) limits the "class of persons who are afforded the right to sue for retaliation." (Pet. App. 7a). That is simply incorrect. Section 704(a) addresses only *what* conduct constitutes forbidden retaliation; section 704(a) does not even purport to address *who* can file suit to enforce that prohibition. The "class of persons who are afforded the right to sue" – for retaliation or any other violation of Title VII – is set out instead in section 706(f)(1), which requires only that a plaintiff be "aggrieved." Similarly, the statutory authorization of suits by the EEOC and the Department of Justice to enforce section 704(a) is found, not in section 704(a), but in section 706.

IV. THE QUESTIONS PRESENTED RAISE IMPORTANT ISSUES AFFECTING THE ADMINISTRATION OF FEDERAL EMPLOYMENT LAWS

For almost half a century the federal agencies responsible for administering the nation's employment laws have insisted with complete consistency that the anti-retaliation provisions of those statutes forbid the use of third-party reprisals to punish workers who engage in protected activities. (Petition 21). The EEOC has adhered to that interpretation of Title VII since 1975, subsequently embodying that construction in its Compliance Manual, and later advancing that view in a series of briefs in the courts of appeals. (Petition 18-19). The Commission's construction of Title VII – and the other anti-discrimination statutes which it enforces – is grounded in its practical judgment that retaliation against family members and others would be a potent tool to obstruct access to the EEOC itself and to other remedial mechanisms. This Court has credited the EEOC's intensely practical evaluation of the consequences of an unduly narrow interpretation of the anti-retaliation provision in Title VII. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Respondent insists that employees who participate in an EEOC investigation are "protected by § [704(a)]." (Br. Opp. 30). Certainly section 704(a) applies to workers who take part in EEOC investigations; the question at issue is what forms of retaliation the statute protects *against*. The Brief in

Opposition suggests that section 704(a), and the majority decision below, permit retaliation against an employee who cooperates with the EEOC, or who engages in other protected activities, by firing family members or others close to the protected worker.

Even if the retaliation alleged in this case were unlawful in the Sixth Circuit, it is emphatically clear that under the court of appeals' decision no private cause of action exists to redress any such violation. From the perspective of a worker deciding whether to complain about discrimination, it is of no practical importance whether reprisals against third parties are permitted by Title VII, or are the subject of a nominal but unenforceable prohibition. Either way no sensible employee would complain about discrimination if doing so would expose a family member or fiancé to a dismissal for which the law would provide no redress.

The Sixth Circuit decision, at best, leaves open the possibility that the EEOC itself – or the Department of Justice, in the case of a state or local government employer – might be able to file suit to enforce section 704(a) in the case of reprisals against a third party. But neither the Commission nor the Department of Justice has the resources to shoulder alone the burden of seeking judicial relief in this entire class of cases. The decision below places inappropriate pressure on both agencies to divert time and effort from other priorities.

The EEOC website continues to assure members of the public that Title VII and other federal anti-discrimination laws forbid an employer from inflicting reprisals on a third party as a method of retaliating against an employee who engages in protected activities.[6] The website of the Department of Justice Civil Rights Division contains a link to that same assurance.[7] At least with regard to millions of employees who work in the Sixth Circuit, that official assurance today is not an accurate statement of the law.

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[6] http://www.eeoc.gov/policy/docs/retal.m.html Visited on November 22, 2009 (part 8-II(C)(3)).

[7] http://www.justice/crt/emp/ Visited November 22, 2009; the link is accessed by clicking on "Title VII."

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-291

In the Supreme Court of the United States

ERIC L. THOMPSON, PETITIONER

v.

NORTH AMERICAN STAINLESS, LP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), prohibits an employer from responding to an employee's protected activity by dismissing a closely associated employee.

2. If so, whether the closely associated employee may sue the employer for retaliation.

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In the Supreme Court of the United States

No. 09-291

ERIC L. THOMPSON, PETITIONER

v.

NORTH AMERICAN STAINLESS, LP

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to this Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Petitioner, Eric Thompson, and Miriam Regalado both worked at a stainless steel manufacturing plant in Kentucky owned by respondent. Pet. App. 3a. They began dating while employed at the plant and became engaged to be married. *Ibid.* "[T]heir relationship was common knowledge at North American Stainless." *Ibid.*

In September 2002, Regalado filed a charge with the Equal Employment Opportunity Commission (EEOC) alleging that her supervisors had discriminated against her based on her sex. Pet. App. 3a. The EEOC notified respondent of this charge on February 13, 2003. *Ibid.*

On March 7, 2003, respondent terminated petitioner. *Ibid.*

2. Petitioner filed a charge with the EEOC alleging that respondent had terminated him solely because of his fiancée's protected activity and that this conduct violated the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* That provision provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. 2000e-3(a); see Pet. App. 4a. The EEOC investigated and concluded that there was "reasonable cause to believe that [respondent] violated Title VII." *Ibid.*

After the EEOC issued a right-to-sue letter, petitioner filed suit in district court. The district court granted respondent's motion for summary judgment. It concluded that "under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engaged in protected activity." Pet. App. 104a.

3. The court of appeals initially reversed, see Pet. App. 64a-90a, but then granted respondent's petition for rehearing en banc and affirmed the district court's grant of summary judgment for respondent. See *id.* at 1a-63a.

The en banc court concluded that "the plain and unambiguous statutory text" of 42 U.S.C. 2000e-3(a) limits "the authorized class of claimants * * * to persons who

have personally engaged in protected activity." Pet. App. 2a.

The court of appeals noted that Title VII "empowers a 'person claiming to be aggrieved' to bring a civil action to enforce the prohibitions against unlawful employment practices contained in the substantive provisions of the statute." Pet. App. 9a n.1 (quoting 42 U.S.C. 2000e-5(f)(1)). The court of appeals also noted that it had previously interpreted this provision to "show[] a congressional intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution." *Id.* at 10a n.1. In the court of appeals' view, petitioner was an "'aggrieved' person" under this standard since "(1) he suffered an injury-in-fact (termination of his employment), (2) as a result of [respondent's] putatively illegal conduct, and (3) it is possible, instead of merely speculative, that his injury is redressable." *Ibid.*

The court of appeals nonetheless held that petitioner did not have a "cause of action" under 42 U.S.C. 2000e-3(a) because petitioner "is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice." Pet. App. 8a. It noted that the Third, Fifth, and Eighth Circuits had all "rejected such third-party retaliation claims" and that "no circuit court of appeals has held that Title VII creates a claim for third-party retaliation in circumstances where the plaintiff has not engaged personally in any protected activity." *Id.* at 11a, 17a.

The court said that its "interpretation does not undermine the anti-retaliation provision's purpose because retaliation is still actionable, but only in a suit by a primary actor who engaged in protected activity and not by a passive bystander." Pet. App. 28a-29a. It went on to

note that "[a]ll of the parties in this case agreed at oral argument that if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to [Section 2000e-3(a)] and, under *Burlington Northern*, defendant's termination of [petitioner] potentially could be deemed an 'adverse employment action' against her." *Id.* at 29a n.10 (quoting *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53 (2006) (*Burlington Northern*)).

Judge Rogers concurred in the result. Pet. App. 29a-33a. In his view, 42 U.S.C. 2000e-3(a) "dictates what practices amount to unlawful retaliation, not who may sue." Pet. App. 30a. He went on to conclude that taking adverse action against someone closely associated with an employee in retaliation for the employee's filing an EEOC charge would clearly constitute unlawful retaliation against the employee. *Id.* at 29a-30a. Nonetheless, the concurring judge thought that petitioner's suit failed because he was not a "person aggrieved" within the meaning of Section 2000e-5(f). "The intended beneficiaries of the anti-retaliation provision of [Section] 2000e-3(a) are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation. It follows that in the retaliation context 'persons aggrieved' must be interpreted to be the persons retaliated against." *Id.* at 32a. Accordingly, Judge Rogers concluded that Regalado, not petitioner, should have brought the claim in this case. *Id.* at 32a-33a.

In one of three dissenting opinions, Judge White stated that "[a]ll members of the en banc panel appear to agree that the firing of an employee's co-worker-spouse (or co-worker-fianc[é]) in retaliation for the employee's opposition to an unlawful employment practice

is unlawful" under Section 2000e-3(a). Pet. App. 53a; see *id.* at 53a-63a. She said the only disagreement centered on whether "the fired spouse has a right to sue under Title VII." *Id.* at 53a.

In Judge White's view, the majority mistakenly looked for the answer to the question of who could sue in the substantive prohibition of 2000e-3(a). That provision "is addressed to declaring that particular conduct by an employer constitutes an unlawful employment practice," not to the separate question of who has a cause of action. Pet. App. 56a. "[O]nce the employer's conduct is found to violate" that section, "there is no reason to look back to [it] to determine who may maintain an action based on the violation." *Id.* at 58a. According to Judge White, the question of whether petitioner could sue turned solely on whether he was "aggrieved by the unlawful employment practice" within the meaning of Section 2000e-5(b). *Ibid.* He clearly was, in her view, because he had lost his job as a result of the unlawful employment practice he challenged. *Id.* at 58a-59a.

Judge Martin, in dissent, contended that petitioner should have been afforded an opportunity to prove he had actually engaged in protected activity himself and that "his employer knew of his unexpressed opposition [to its treatment of Regalado] and fired him for that reason." Pet. App. 38a; see *id.* at 33a-38a. Judge Moore argued that "the majority's plain-language interpretation of the statute defeats the Congressional purpose." *Id.* at 41a; see *id.* at 38a-53a.

DISCUSSION

CERTIORARI SHOULD BE DENIED BECAUSE THE COURT OF APPEALS' DECISION, WHILE ERRONEOUS, DID NOT CREATE A DIVISION IN THE CIRCUITS OR A SIGNIFICANT GAP IN THE STATUTE'S COVERAGE

As the court of appeals acknowledged, responding to an employee's protected activity by dismissing a closely associated employee is unlawful retaliation under 42 U.S.C. 2000e-3(a). The court nonetheless erred by concluding that the dismissed, closely-associated employee cannot challenge his dismissal in court. Title VII provides a cause of action for any party "aggrieved" by an unlawful employment practice, and an employee dismissed as a direct and proximate result of such a practice meets this standard. Although the court of appeals erred, this Court's review is not warranted. There is no conflict in the circuits on the dispositive question presented by this case. All four courts of appeals to address it have concluded that plaintiffs in petitioner's position cannot pursue retaliation claims under Title VII and civil rights statutes with analogous provisions. Decisions cited by petitioner permitting such claims to proceed under other statutes are inapposite because of differences in the relevant provisions and enforcement schemes. Finally, since third-party retaliation remains an illegal employment practice in the Sixth Circuit, the court of appeals' decision does not create the kind of disturbing gap in Title VII's coverage that might warrant this Court's intervention even without a conflict in the circuits.

A. There Is No Division In The Circuits

1. Four courts of appeals have considered third-party retaliation claims asserted by employees in the

position of petitioner under Title VII or statutes with substantially identical anti-retaliation provisions, and all four have rejected them. See Pet. App. 2a; *Fogleman* v. *Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3d Cir.) (Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*), cert. denied, 537 U.S. 824 (2002); *Smith* v. *Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998) (Title VII); *Holt* v. *JTM Indus., Inc.*, 89 F.3d 1224, 1226-1227 (5th Cir. 1996) (ADEA), cert. denied, 520 U.S. 1229 (1997).

It is true that the courts have taken somewhat different routes to this result. See Pet. 32-33, 35-36. The Third and Eighth Circuits appear to have concluded that the substantive prohibitions against retaliation do not prohibit actions taken against someone other than the employee engaged in protected activity. See *Fogleman*, 283 F.3d at 568; *Smith*, 151 F.3d at 819.[1] By contrast, the Fifth Circuit identified the defect in the suit before it as one of "standing," *Holt*, 89 F.3d at 1226, while the court of appeals in this case held that petitioner had no "cause of action," Pet. App. 9a. Such analytical deviations on route to the same bottom-line result, however, do not merit this Court's attention.[2]

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[1] As noted below (p. 15, *infra*), that conclusion is inconsistent with the interpretation of the anti-retaliation provision articulated in *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), and those courts would likely reconsider their views in light of that decision if presented with the question again.

[2] Nor is there any conflict with other Title VII cases briefly discussed by petitioner. See Pet. 30-31. Although *Wu* v. *Thomas*, 863 F.2d 1543 (11th Cir. 1989), involved a claim of third-party retaliation, both employees (the one who engaged in protected activity and the one who was allegedly the subject of adverse employment actions as a result) were plaintiffs, and the defendant did not make the argument advanced by respondent in this case. In *McDonnell* v. *Cisneros*, 84 F.3d 256 (7th

In addition, further percolation in the courts of appeals on this issue is warranted. Until the decision in this case, no court appears to have addressed petitioner's argument that he may challenge the retaliation directed at Regalado because he was "aggrieved" by it within the meaning of Article III and 42 U.S.C. 2000e-5(f)(1). See Pet. 22-23; see also Pet. App. 53a-63a (White, J., dissenting). This Court's ultimate review of this argument would benefit from its further evaluation by lower courts.

2. Nor is this Court's review warranted to reconcile what petitioner contends is a conflict between the court of appeals' decision and those from other courts construing third-party retaliation claims arising under a variety of other statutes. See Pet. 26-32. Those statutes have differently worded substantive provisions, different enforcement schemes, or both. The differences in outcomes highlighted by petitioner thus do not constitute a conflict.

For example, petitioner cites several cases involving the National Labor Relations Act (NLRA), 29 U.S.C. 158(a). See Pet. 26-28. Those cases found that third-party retaliation violated 29 U.S.C. 158(a)(1) of the NLRA, which makes it an unlawful labor practice "to interfere with, restrain, or coerce employees in the exer-

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Cir. 1996), the court held that an employee who was subject to retaliation for failing to have another employee withdraw her sexual harassment complaints had a cause of action because he had effectively "opposed" the sexual harassment himself by refusing to silence the complainant. *Id.* at 262. He had thus engaged in protected activity. *Ibid.* In *Drake* v. *Minnesota Mining & Manufacturing Co.*, 134 F.3d 878 (7th Cir. 1998), the court merely "assume[d]" without deciding that an employee could assert a claim for "retaliation based on her husband's protected activities," but found no retaliation because the actions she complained of were not substantial enough. *Id.* at 886.

cise of the rights guaranteed in" the NLRA. Title VII includes no comparable provision, so the two lines of authority are not in conflict.[3] In addition, individual employees cannot file unfair labor practice claims in the federal courts, but are limited to filing unfair labor practice charges with the NLRB. Whether to proceed at all on those charges is a matter confided to the unreviewable discretion of the NLRB General Counsel, who is responsible for prosecuting the case before the Board if a complaint issues. See *NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112 (1987). Thus, the question of who is the proper plaintiff in a third-party retaliation case is not implicated in NLRA cases.

In *Reich* v. *Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir. 1994), the court found that the dismissal of an employee who was the "special friend" of another employee in response to the second employee's complaints about health and safety violations violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c).[4] *Reich*, 26 F.3d at 1188-1189; see Pet. 28.

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[3] Petitioner also points to a portion of *Fogleman*, 283 F.3d at 564, 570-571, that permitted a claim for third-party retaliation to proceed under the Americans With Disabilities Act (ADA), 42 U.S.C. 12101, *et seq.* See Pet. 32. *Fogleman* rested its holding on 42 U.S.C. 12203(b), which, borrowing language from the NLRA, makes it "unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of * * * any right granted or protected by this chapter." 283 F.3d at 570. Since Title VII includes no such provision, *Fogleman*'s analysis of a claim of third-party retaliation under the ADA does not conflict with the court of appeals' decision in this case.

[4] That provision provides in relevant part that "[n]o person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding or because of the exercise

The suit in that case was not brought by the discharged employee, however, but rather by the Secretary of Labor. See *Reich*, 26 F.3d at 1188; 29 U.S.C. 660(c)(2). It thus did not present the question of which employee would have a private "cause of action" in a case of third-party retaliation and does not conflict with the court of appeals' decision here.[5]

Nor is there any conflict between the court of appeals' decision here and *Fitzgerald* v. *Codex Corp.*, 882 F.2d 586 (1st Cir. 1989). See Pet. 29. That case involved a provision of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, that makes it unlawful "to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan." 29 U.S.C. 1140. The First Circuit found that an employer's dismissal of an employee (a "participant") because of a suit against the employer by his ex-wife (a "benefi-

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by such employee on behalf of himself or others of any right afforded by this chapter." 29 U.S.C. 660(c)(1).

[5] For the same reason, there is no conflict between the court of appeals' decision here and *Brock* v. *Georgia Southwestern College*, 765 F.2d 1026 (11th Cir. 1985), which involved the anti-retaliation provision applicable to the Equal Pay Act, 29 U.S.C. 215(a)(3) (making it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."). See Pet. 28. Like the court of appeals here (Pet. App. 29a n.10), the Eleventh Circuit found third-party retaliation unlawful. See *Brock*, 765 F.2d at 1037-1038. Since the suit was brought by the Secretary of Labor, see *id.* at 1029, *Brock* did not present the question of which employee would be the proper plaintiff in a private action challenging the discharge.

ciary") violated this provision and could be challenged in a suit by the dismissed employee. *Fitzgerald*, 882 F.2d at 589-590. Given that Section 1140 prohibits retaliation against both a "participant" and a "beneficiary" and that ERISA's civil enforcement provision expressly provides for suits by either, 29 U.S.C. 1132(a), the First Circuit's analysis does not conflict with the court of appeals' interpretation of the distinct terms of Title VII.

B. The Court Of Appeals' Decision Does Not Leave A Substantial Gap In Title VII's Coverage

Petitioner contends that review is warranted because "[u]nder the decision of the court below, the very act of cooperating with EEOC investigators now carries a clear and unredressable risk of harm" because employers can freely retaliate against the cooperator's family members. Pet. 39-40. This concern is based on a misreading of the court of appeals' decision. The court of appeals did not hold that third-party retaliation is outside the scope of Section 2000e-3(a). See Pet. App. 28a-29a & n.10; see also *id.* at 53a (White, J., dissenting) ("All members of the en banc panel appear to agree that the firing of an employee's co-worker-spouse (or co-worker-fianc[é]) in retaliation for the employee's opposition to an unlawful employment practice is unlawful under [Section] 704(a), 42 U.S.C. § 2000e-3(a)."). Instead, the court of appeals held that this unlawful employment practice could be challenged only by the employee who engaged in the protected activity and not by the employee who did not. *Id.* at 28a-29a & n.10.

As explained below, the United States believes this interpretation of the statute was erroneous, and it also believes that it unnecessarily reduces the efficacy of the prohibition on retaliation by barring third-party retalia-

tion claims by plaintiffs with the greatest incentive to pursue them. Nonetheless, because third-party retaliation remains an unlawful employment practice in the Sixth Circuit, the court of appeals' decision has not created the kind of substantial gap in the statute's coverage that might merit this Court's review when there is no conflict in the circuits.

Although the United States agrees with petitioner that permitting suit by the employee who suffered the economic injury as the result of the retaliation (here, petitioner) would simplify remedial issues in a third-party retaliation case, it disagrees that a suit by the employee in Regalado's position would be incapable of providing a remedy to the dismissed employee. See Pet. 15. Regalado would have had Article III standing to challenge the dismissal of petitioner because that dismissal violated *her* statutory right to be free of retaliation for engaging in protected activity. See *Linda R. S.* v. *Richard D.*, 410 U.S. 614, 617 n.3 (1973) ("Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."). Moreover, if Regalado had brought such a suit and established a violation, the district court could have used its broad equitable power to fashion an appropriate remedy, which could have included recompense for petitioner. See 42 U.S.C. 2000e-5(g) (court in Title VII case authorized to award "such affirmative action as may be appropriate" and "any other equitable relief * * * the court deems appropriate"); *Castle* v. *Rubin*, 78 F.3d 654, 657 (D.C. Cir. 1996) ("The district court has broad discretion to fashion appropriate equitable relief for a Title VII plaintiff.").

C. The Court Of Appeals Erred In Concluding That An Employee Dismissed Because Of The Protected Activity Of A Closely Associated Employee Cannot Maintain A Title VII Action

1. Third-party retaliation is an unlawful employment practice

As all the judges on the en banc court of appeals appear to have agreed, dismissing an employee as retaliation for his fiancée's protected activity is an unlawful employment practice prohibited by 42 U.S.C. 2000e-3(a). See Pet. App. 29a n.10; see also *id.* at 53a (White, J., dissenting). Respondent "discriminate[d] against" Regalado because she filed an EEOC complaint. 42 U.S.C. 2000e-3(a). Other employees—the ones who did not engage in protected activity—did not have their fiancés fired.

In *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), the Court held that Title VII's anti-retaliation provision prohibited more than just a "materially adverse change in the terms and conditions" of employment. *Id.* at 60 (citation omitted). Instead, it prohibits all actions that a "reasonable employee would have found * * * materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks and citations omitted). As the Court explained, "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Id.* at 63.

An employer can effectively retaliate against an employee by directly causing a significant harm to a family member, spouse, or other closely associated individual.

See *Burlington Northern*, 548 U.S. at 63-64 (citing as example of unlawful retaliation by the Federal Bureau of Investigation (FBI) "the FBI's refusal, contrary to policy, to investigate death threats a federal prisoner made against [the agent] *and his wife*") (citation omitted; brackets in original; emphasis added). A reasonable employee would likely find dismissal of a family member or other closely associated person, such as a fiancé, "materially adverse": the prospect that it would happen upon filing a charge might very well persuade her not to file. Respondent's dismissal of petitioner in response to Regalado's protected activity thus constituted an unlawful employment practice in violation of Section 2000e-3(a).

In *Fogleman*, the Third Circuit held that the anti-retaliation provision of the ADEA, which is substantially identical to the one in Title VII, "allow[ed] an employer to retaliate against a third party with impunity" in response to an employee's protected activity. 283 F.3d at 564. The court acknowledged that this reading of the anti-retaliation provision was contrary to its purpose since "[t]here can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights." *Id.* at 568-569. Nonetheless, in the court's view, "[t]he plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity." *Id.* at 568. The Eighth Circuit also held that "Title VII's anti-retaliation provision" does not "prohibit employers from taking adverse action against employees whose spouses or significant others have engaged in statutorily protected activity against the employer." *Smith*, 151 F.3d at 819.

Both *Fogleman* and *Smith* were issued before this Court's decision in *Burlington Northern*. In light of that decision, it is now clear that responding to an employee's protected activity by dismissing a closely associated employee would violate the prohibition on retaliation. "[T]he person retaliated against" in such a case *is* "the person who engaged in the protected activity," *Fogleman*, 283 F.3d at 568, since a reasonable employee in that position "would have found" the dismissal of someone close to her "materially adverse, which in this context means it well might have dissuaded [her] from making or supporting a charge of discrimination," *Burlington Northern*, 548 U.S. at 68 (internal quotation marks and citation omitted).

2. Petitioner was "aggrieved" by the unlawful employment practice he challenged and thus had standing and a cause of action

a. The court of appeals concluded that petitioner could not challenge the unlawful employment practice at issue in this case because he had no "cause of action under [Section] 704(a) of Title VII." Pet. App. 9a. The court's analytical approach to this question was erroneous.

In reaching its conclusion that petitioner had no "cause of action," the court of appeals relied on *Davis* v. *Passman*, 442 U.S. 228 (1979). See Pet. App. 9a & n.1. In that case, this Court addressed the question "whether a cause of action and a damages remedy can * * * be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated." *Davis*, 442 U.S. at 230. The answer to that question required an altogether different analysis than the one needed here. As *Davis* explained, "the question of who

may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." *Id.* at 241.

When statutory rights are at issue, "it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner." *Davis*, 442 U.S. at 241. In the case of Title VII, Congress did so in 42 U.S.C. 2000e-5(f)(1), where it provided a cause of action for a "person claiming to be aggrieved" by a violation of the statute. The question of who is a proper Title VII plaintiff is thus governed by that express statutory provision, see Pet. App. 30a (Rogers, J., concurring), not by the test courts apply when deciding whether to provide a remedy in the *absence* of a statutory cause of action. See Pet. 23. Accordingly, the question whether petitioner can challenge the unlawful employment practice at issue in this case turns on whether he was a "person claiming to be aggrieved" by it within the meaning of the express statutory cause of action in 42 U.S.C. 2000e-5(f)(1). Since the court of appeals held that petitioner was in fact "aggrieved" within the meaning of this provision, see Pet. App. 10a n.1, 13a n.4, it should have concluded that his suit could proceed.

b. Judge Rogers in concurrence concluded that petitioner was not a "person aggrieved" within the meaning of 2000e-5(f)(1) because that provision had to be interpreted in light of the prudential standing rule that prohibits plaintiffs from asserting the legal rights of third-parties. Pet. App. 31a-32a (citing *Kowalski* v. *Tesmer*, 543 U.S. 125 (2004)). Because petitioner sought to challenge an act of retaliation taken in response to Regalado's activity, Judge Rogers concluded petitioner lacked prudential standing to proceed. See *ibid.* This analysis

fails in light of Congress's modification of prudential standing requirements in the context of Title VII. See *id.* at 9a n.1.

"[U]nlike their constitutional counterparts," prudential standing requirements "can be modified or abrogated by Congress." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997). In *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), the Court held that Congress had relaxed prudential standing requirements for plaintiffs asserting claims under the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, which authorized suit by "[a]ny person who claims to have been injured by a discriminatory housing practice * * * (hereafter "person aggrieved")." *Trafficante*, 409 U.S. at 206 n.1 (quoting 42 U.S.C. 3610(a) (1982)). In doing so, the Court expressly analogized the Fair Housing Act's suit provision with the very similar one in Title VII and favorably cited a court of appeals decision holding that Congress had modified prudential standing requirements related to that statute as well. *Id.* at 209 (citing *Hackett* v. *McGuire Bros., Inc.*, 445 F.2d 442 (3d Cir. 1971)).

In light of Congress's exercise of its prerogative to modify prudential standing requirements in Title VII cases, petitioner was "aggrieved" by his own dismissal within the meaning of 42 U.S.C. 2000e-5(f)(1). Crucially, his employment was terminated as a direct and proximate result of the unlawful employment practice he sought to challenge. He was thus not just "any person affected by the imposition of retaliation." Pet. App. 31a n.1 (Rogers, J., concurring). The purpose behind the

retaliation was to punish Regalado, but its sole practical target was petitioner.[6]

c. The conclusion that petitioner's suit should have been permitted to proceed is also consistent with the EEOC's longstanding view. The EEOC has stated that "[r]etaliation against a close relative of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees." *EEOC Compl. Man.* § 8-II(B)(3)(c) (1998); see *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (EEOC Compliance Manual "reflect[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance.") (internal quotation marks omitted).

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[6] Given the tight nexus between petitioner's injury and the employment practice he sought to challenge, the conclusion that he was a party "aggrieved" with his own cause of action did not require the court of appeals to rely on the full reach of its precedent holding that Congress intended the person "aggrieved" provision to eliminate *all* prudential standing requirements and thus "define standing under Title VII as broadly as is permitted by Article III of the Constitution." Pet. App. 10a n.1; see Pet. 24. Questions about the outer reaches of the meaning of persons "aggrieved" are therefore not presented by this case, and this case is not a suitable vehicle for resolving them.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JOINT APPENDIX

No. 09-291

Supreme Court, U.S.
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In The Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

JOINT APPENDIX

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RELEVANT DOCKET ENTRIES FOR THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Date Filed	No.	Docket Text
01/27/2005	1	COMPLAINT 1 summons issued with copy (Filing fee $150; receipt number 114506), filed by Eric L. Thompson. (Attachments: # 1 Civil Cover Sheet, Case Assignment, Receipt & Summons) (CBD) (Entered: 01/27/2005)
		* * *
02/15/2005	4	ANSWER to Complaint with JURY DEMAND by North American Stainless, FLP. (CBD) (Entered: 02/15/2005)
		* * *
04/03/2006	12	MOTION for Summary Judgment by North American Stainless, FLP (Attachments: # 1 Memorandum in Support # 2 Proposed Order # 3 Exhibit Unpublished Opinion Bell v. Safety # 4 Exhibit A – M. Regalado EEOC Notice of Charge of Discrimination # 5 Exhibit C – Thompson Memorandum to Fuentes # 6 Appendix IA – Regalado Deposition Transcript Excerpts # 7 Appendix IB – Thompson Deposition Transcript Excerpts # 8 Exhibit B – M. Regalado EEOC Notice of Dismissal and Rights) (Latherow, Leigh) Modified

description of Exhibit B-M. Regalado EEOC Notice of Dismissal and Rights on 4/3/2006 (Ratliff, Kay). (Entered: 04/03/2006)

* * *

04/25/2006 15 RESPONSE in Opposition re 12 MOTION for Summary Judgment by North American Stainless, FLP filed by Eric L. Thompson. (Attachments: # 1 Proposed Order) (Suetholz, David) Additional attachment: Corrected Memo added on 4/26/2006 (Dearborn, Christy). Additional attachments: Exhibits, Depos, & Proposed Order added on 4/27/2006 (Dearborn, Christy). (Entered: 04/25/2006)

04/26/2006 16 NOTICE OF FILING by Eric L. Thompson re 15 Response in Opposition to Motion, *Attachments* (Attachments: # 1 Exhibit Exhibits # 2 Exhibit Deposition # 3 Exhibit Deposition # 4 Exhibit Deposition # 5 Exhibit Deposition # 6 Exhibit Deposition # 7 Exhibit Deposition # 8 Exhibit Deposition # 9 Exhibit Deposition # 10 Exhibit Deposition # 11 Exhibit Case Law # 12 Proposed Order Order) (Suetholz, David) (Entered: 04/26/2006)

* * *

05/09/2006	20	REPLY to Response to Motion re 12 MOTION for Summary Judgment by North American Stainless, FLP filed by North American Stainless, FLP. (Attachments: # 1 Exhibit 1 – Regalado Dismissal and Notice of Rights # 2 Exhibit 2 – Regalado Charge of Discrimination # 3 Exhibit 3 – Thompson Charge of Discrimination # 4 Exhibit 4 – Thompson depo. p.155) (CBD) (Entered: 05/18/2006)

* * *

06/20/2006	27	OPINION AND ORDER: dft's Motion for Summary Judgment 12 is GRANTED and action is STRICKEN . Signed by Judge Karen K. Caldwell. (CBD)cc: COR, Diary (Entered: 06/21/2006)
06/20/2006	28	JUDGMENT: 1) dft's Motion for Summary Judgment 12 GRANTED 2) judgment is FINAL & APPEALABLE 3) matter STRICKEN from active docket. Signed by Judge Karen K. Caldwell. (CBD)cc: COR (Entered: 06/21/2006)

06/30/2006	29	MOTION to Amend/Correct it's Order 27 dated 6/21/2006 by Eric L. Thompson (Attachments: # 1 Proposed Order to Alter or Amend # 2 Memorandum in Support of Plaintiff's Motion to Alter or Amend # 3 Case Law)(Suetholz, David) Modified text by adding "it's Order dated 6/21/2006" & link to Order 27 on 7/3/2006 (Dearborn, Christy). (Entered: 06/30/2006)
07/10/2006	30	RESPONSE to 29 *Plaintiff's Motion to Amend* filed by North American Stainless, FLP. (Latherow, Leigh) (Entered: 07/10/2006)
12/18/2006	31	OPINION AND ORDER: Court ORDERS that plaintiff's Motion to Alter or Amend 29 is DENIED. Signed by Judge Karen K. Caldwell. (CBD)cc: COR (Entered: 12/18/2006)

* * *

04/01/2008	35	INFORMATION COPY OF OPINION & JUDGMENT of USCA as to 32 Notice of Appeal filed by Eric L. Thompson: judgment of district court is REVERSED (Attachments: # 1 Judgment) (CBD) (Entered: 04/01/2008)

06/05/2009	36	INFORMATION COPY OF OPINION AND JUDGMENT of USCA as to 32 Notice of Appeal filed by Eric L. Thompson Appeal the judgment of the district court granting summary judgment in favor of defendant North American Stainless, LP is AFFIRMED (Attachments: # 1 Judgment) (CBD) (Additional attachment(s) added on 6/10/2009: # 2 Corrected Page No. 1) (CBD). (Entered: 06/05/2009)

RELEVANT DOCKET ENTRIES FOR THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Date Filed	Docket Text
01/11/2007	Civil Case Docketed. Notice filed by Appellant Eric L. Thompson. Transcript needed: (AC)
	* * *
03/07/2007	PROOF BRIEF filed by Joseph D. Wibbels and David O'Brien Suetholz for Appellant Eric L. Thompson. Certificate of service date 3/6/07 . [07-5040] (AC)
	* * *
04/10/2007	PROOF BRIEF filed by Gregory L. Monge and Leigh G. Latherow for Appellee North Amer Stainless. Certificate of service date 4/9/07. [07-5040] (AC)
	* * *
05/07/2007	PROOF REPLY BRIEF filed by David O'Brien Suetholz and Joseph D. Wibbels for Appellant Eric L. Thompson. Certificate of service date 5/3/07. [07-5040] Final reply brief due 5/31/07 [07-5040] (LMN)
	* * *
05/11/2007	APPENDIX filed by David O'Brien Suetholz for parties. Copies: 5. Certificate of service date 5/10/07 [07-5040] (RECEIVED 25 ADDITIONAL COPIES

ON 9/4/08) – [Edited 09/10/2008 by AC] (AC)

* * *

05/25/2007 FINAL BRIEF filed by Joseph D. Wibbels and David O'Brien Suetholz for Appellant Eric L. Thompson. Copies: 7. Certificate of s rvice date 5/24/07 Argument Request: require. [07-5040] (RECEIVED ADD'L 25 COPIES ON 9/4/08) – [Edited 09/10/2008 by AC] (AC)

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06/01/2007 FINAL BRIEF filed by Gregory L. Monge and Leigh G. Latherow for Appellee North Amer Stainless. Copies: 7. Certificate of service date 5/31/07. Argument Request: require. [07-5040] (RECEIVED 25 ADD'L COPIES ON 10/3/08) – [Edited 10/03/2008 by AC] (AC)

* * *

03/31/2008 OPINION filed: REVERSED; decision for publication pursuant to local rule 206. Karen Nelson Moore and Richard Allen Griffin, (DISSENTING) Circuit

Judges and Arthur J. Tarnow (AUTHORING), U.S. District Judge. (DA)

* * *

07/28/2008 ORDER filed granting petition for en banc rehearing [3760020-2] filed by Ms. Leigh Gross Latherow for North American Stainless, FLP to reinstate case. The previous decision and judgment of this court is vacated, the mandate is stayed. Danny J. Boggs, Chief Circuit Judge; Boyce F. Martin, Jr., Alice M. Batchelder, Martha Craig Daughtrey, Karen Nelson Moore, R. Guy Cole, Jr., Eric L. Clay, Ronald Lee Gilman, Julia Smith Gibbons, John M. Rogers, Jeffrey S. Sutton, Deborah L. Cook, David W. McKeague, Richard Allen Griffin, Raymond M. Kethledge, Circuit Judges. (BLH)

* * *

09/04/2008 SUPPLEMENTAL BRIEF filed by Attorney Mr. David O'Brien Suetholz for Appellant Eric L. Thompson. Copies: 25. Certificate of Service: 09/03/2008. (AC)

* * *

10/03/2008 SUPPLEMENTAL BRIEF filed by Attorney Ms. Leigh Gross Latherow for Appellee North American Stainless, FLP. Copies: 25. Certificate of Service: 10/02/2008. (AC)

* * *

06/05/2009	OPINION filed: The judgment of the district court granting summary judgment in favor of defendant North American Stainless is AFFIRMED; decision for publication pursuant to local rule 206. Danny J. Boggs, Chief Judge; Boyce F. Martin, Jr., Alice M. Batchelder, Martha Craig Daughtrey, Karen Nelson Moore, R. Guy Cole, Jr., Eric L. Clay, Ronald Lee Gilman, Julia Smith Gibbons, John M. Rogers, Jeffrey S. Sutton, Deborah L. Cook, David W. McKeague, Richard Allen Griffin, Raymond M. Kethledge, and Helene N. White, Circuit Judges. Griffin, J., delivered the opinion of the court, in which Boggs, C. J., Batchelder, Gilman, Gibbons, Sutton, Cook, McKeague, and Kethledge, JJ., joined. Rogers, J. (pp. 18-20), delivered a separate opinion concurring in the result. Martin, J. (pp. 21-24), delivered a separate dissenting opinion, in which Daughtrey, Moore, Cole, Clay, and White, JJ., joined, with Moore, J. (pp. 25-33), joined by Martin, Daughtrey, Cole, Clay, and White, JJ., and White, J. (pp. 34-40), also delivering separate dissenting opinions. (LKM)
06/05/2009	JUDGMENT: AFFIRMED. (LKM)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT DIVISION

[3: 05cv2JMH]

ERIC L. THOMPSON, Plaintiff vs. NORTH AMERICAN STAINLESS, FLP Defendant	**COMPLAINT FOR DAMAGES** **DEMAND FOR JURY TRIAL** (Filed Jan. 27, 2005)

PRELIMINARY STATEMENT

1. This is a civil rights action alleging that the Plaintiff, ERIC L. THOMPSON, was unlawfully terminated by the Defendant because of his wife's charge with the Equal Employment Opportunity Commission. Plaintiff seeks compensatory and punitive damages, costs and attorneys fees for the retaliation he has suffered.

JURISDICTION & VENUE

2. The Court has jurisdiction over this action pursuant to the provisions of Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991 – specifically 42 U.S.C. 2000e-5(f)(3).

3. Venue is proper in the Eastern District of Kentucky under 42 U.S.C. § 2000e-5(f)(3) because the

Defendant's unlawful practices were committed in this district.

PARTIES

4. Plaintiff, ERIC L. THOMPSON, is a man residing in Jefferson County, Kentucky, and who at all times relevant herein was employed by Defendant in Carroll County, Kentucky.

5. Defendant NORTH AMERICAN STAINLESS, FLP is a foreign corporation with its principal place of business in Ghent, Kentucky. At all times relevant herein, the Defendant operates a factory in Carroll County, Kentucky, and was the Plaintiff's employer within the meaning of 42 U.S.C. § 2000e (a) and (b).

STATEMENT OF FACTS

6. Plaintiff was employed by the Defendant from February, 1997 until March, 2003.

7. From 1997 to 2003, Plaintiff worked as a Quality Control Engineer. During that time, Plaintiff received multiple salary increases based on job performance.

8. On or about September, 2002, Miriam Regaldo, Plaintiff's then fiancé, currently Plaintiff's wife, filed a charge with the Equal Employment Opportunity Commission (hereinafter "EEOC") alleging that the Defendant discriminated against her with respect to her terms and conditions of employment

based on her gender. The EEOC notified the Defendant of this charge in February, 2003.

9. When the Defendant received notice that Miriam Regaldo had filed an EEOC charge against it based on gender discrimination, the Defendant retaliated against Plaintiff by terminating him under the pretext that his job performance was lacking.

10. Plaintiff filed a charge with the EEOC. The EEOC investigated the charge and determined that there was "reasonable cause to believe that [the Defendant] violated Title VII." Title VII of the Civil Rights Act of 1964 is codified in 42 U.S.C. § 2003e-3(a). After finding reasonable cause of a violation of Title VII, the EEOC began conciliation efforts.

11. The EEOC unsuccessfully attempted to conciliate the matter and eventually issued a right to sue letter on October 29, 2004. Plaintiff received the right to sue letter shortly thereafter.

CLAIM FOR RELIEF

12. Plaintiff realleges and incorporates herein by reference the allegations contained in paragraphs one (1) through eleven (11) above.

13. Defendant has intentionally retaliated against Plaintiff because his wife, Miriam Thompson, filed a charge with the Equal Employment Opportunity Commission based on gender discrimination prohibited by 42 U.S.C. § 2000e-2(a). Plaintiff's relationship

to Miriam Thompson was the sole motivating factor in his termination.

14. The Defendant's retaliation against Plaintiff has been committed with malice or with reckless indifference to his statutorily protected rights.

15. Plaintiff has been damaged by virtue of Defendant's conduct. As a result of the deprivations described above, Plaintiff has been terminated; has suffered humiliation and embarrassment; and has suffered lost wages, fringe benefits and other compensatory and punitive damages.

16. Plaintiff is entitled to affirmative action and other equitable relief, including compensation for lost wages and benefits and reasonable attorney's fees, as this Court deems appropriate under 42 U.S.C. § 2000e-5(g).

WHEREFORE, Plaintiff respectfully requests that the Court:

a. Award compensatory and general damages to Plaintiff, including but not limited to lost wages, in an amount to be determined at trial;

b. Award punitive damages to Plaintiff in an amount to be determined at trial,

c. Award Plaintiff prejudgment interest to the maximum extent permitted by law;

d. Award Plaintiff his costs, expenses and reasonable attorneys' fees pursuant to 42 U.S.C. § 1988; and

e. Grant Plaintiff such other relief as the Court may deem appropriate and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b), Federal Rules of Civil Procedure, Plaintiff demands trial by jury for all of the issues pled herein so triable.

VERIFICATION

Pursuant to 28 U.S.C. § 1746, Plaintiff Eric L. Thompson, declares under penalty of perjury under the laws of the United States of America that he has read the foregoing Complaint and the factual allegations contained therein are true and correct to the best of his knowledge and belief.

1/26/2005 /s/ Eric L. Thompson
DATE ERIC L. THOMPSON,
PLAINTIFF

STATE OF KENTUCKY)
)
COUNTY OF JEFFERSON)

The foregoing Notary Public, states that Eric L. Thompson appeared before me today and signed this Verified Complaint.

My Commission Expires: May 20, 2008

/s/ David O'Brien Suetholz
NOTARY PUBLIC
STATE AT LARGE

Respectfully submitted,

SEGAL STEWART
CUTLER LINDSAY
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COUNSEL FOR PLAINTIFF

United States District Court for the
Eastern District of Kentucky

Exhibit A to Motion for Summary Judgment by North American Stainless

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	PERSON FILING CHARGE Regalado, Miriam
Ms. Susie Poling Director of Human Resources North American Stainless 6870 U S 42 E Carrollton, KY 41045	THIS PERSON (check one) ☒ CLAIMS TO BE AGGRIEVED ☐ IS FILING ON BEHALF OF ANOTHER
	DATE OF ALLEGED VIOLATION *Earliest* 08/14/2002 *Most Recent* 08/28/2002
	PLACE OF ALLEGED VIOLATION Carrollton, KY
	CHARGE NUMBER 241A300346

NOTICE OF CHARGE OF DISCRIMINATION
(See EEOC "Rules and Regulations" before completing this Form)

You are hereby notified that a charge of employment discrimination has been filed against your organization under:

☒ TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

- ☐ THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967
- ☐ THE AMERICANS WITH DISABILITIES ACT
- ☒ THE EQUAL PAY ACT (29 U.S.C., SECT. 206(d)) investigation will be conducted concurrently with our investigation of this charge.

The boxes checked below apply to your organization:

1. ☐ No action is required on your part at this time.
2. ☐ Please submit by _____ a statement of your position with respect to the allegation(s) contained in this charge, with copies of any supporting documentation. This material will be made a part of the file and will be considered at the time that we investigate this charge. Your prompt response to this request will make it easier to conduct and conclude our investigation of this charge.
3. ☒ Please respond fully by 03/07/03 to the attached request for information which pertains to the allegations contained in this charge. Such information will be made a part of the file and will be considered by the Commission during the course of its investigation of the charge.

For further inquiry on this matter, please use the charge number shown above. Your position statement, your response to our request for information, or any inquiry you may have should be directed to:

Louisville Area Office	Kenneth Jackey
600 Dr. Martin L. King Jr., Place	*(Commission Representative)*
Suite 268	(502) 582-5746
Louisville, Kentucky 40202-2285	*(Telephone Number)*

☐ Enclosure: Copy of Charge		
BASIS FOR DISCRIMINATION ☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION ☐ NAT. ORIGIN ☐ AGE ☐ DISABILITY ☐ RETALIATION ☒ OTHER		
CIRCUMSTANCES OF ALLEGED VIOLATION Charging Party alleges that around August 14, 2002, I was demoted to Meltshop Lab Coordinator and on August 28, 2002, she was again demoted from Meltshop Lab Coordinator to Quality Control Engineer. She stated that as a Meltshop Lab Coordinator she was paid less than Tom Haney.		
DATE	TYPE NAME/TITLE OF AUTHORIZED EEOC OFFICIAL	SIGNATURE
02/13/2003	Marcia Hall-Craig Director	Marcia Hall-Craig

RESPONDENT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Exhibit B to Motion for Summary Judgment by North American Stainless

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To:
Miriam Regalado

From:
Equal Employment Opportunity Commission (EEOC)
Louisville Area Office
600 Dr. Martin Luther King Jr. Place, Suite 268
Louisville, Kentucky 40202

[ ] *On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))*

Charge No.	EEOC Representative	Telephone No.
241-2003-00346	Kenneth Jackey, Investigator	502-582-5746

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

[ ] The facts alleged in the charge fail to state a claim under any of the statutes enforced by the EEOC.

[ ] Your allegations did not involve a disability that is covered by the Americans with Disabilities Act.

[ ] The Respondent employs less than the required number of employees or is not otherwise covered by the statutes.

[ ] We cannot investigate your charge because it was not filed within the time limit required by law.

[ ] Having been given 30 days in which to respond, you failed to provide information, failed to appear or be available for interviews/conferences, or otherwise failed to cooperate to the extent that it was not possible to resolve your charge.

[ ] While reasonable efforts were made to locate you, we were not able to do so.

[ ] You had 30 days to accept a reasonable settlement offer that affords full relief for the harm you alleged.

[X] The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

[ ] The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

[ ] Other (briefly state) _____

- NOTICE OF SUIT RIGHTS -

Title VII, the Americans with Disabilities Act and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may file a lawsuit against the respondent(s) under federal law based on this charge in federal or state court. Your lawsuit **must be filed *WITHIN 90 DAYS* of your receipt of this Notice;** otherwise, your right to sue based on this charge will be lost. (The time limit for filing suit based on a state claim may be different.)

Equal Pay Act (EPA): EPA suits must be filed in federal or state court within 2 years (3 years for willful violations) of the alleged EPA underpayment. **This means that backpay due for any violations that occurred *more than 2 years (3 years)* before you file suit may not be collectible.**

If you file suit based on this charge, please send a copy of your court complaint to this office.

On behalf of the Commission

/s/ Marcia Hall-Craig — September 8, 2003

Marcia Hall-Craig, Director — (Date)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

Exhibit C to Motion for Summary Judgment by North American Stainless

TO: Chris Fuentes

FROM: Eric Thompson

THANKFULL: I want to work and continue to work for NAS which has shown sound business strategies to ensure its future in a world market. I am grateful for the opportunity given 6 years ago as an inexperienced graduate.

COMMITTED: I have worked hard for NAS to ensure its success and have provided without question, all asked of me in a timely fashion. I have never missed a day of work in 6 years (1 day 1st week flooded home town). I am now currently training other engineers without fear of becoming obsolete.

COMPENSATION: I am disappointed in compensation this year. When change to salary concerns were voiced several years ago, trust in the company and an implied make-up difference response was given. Now while hourly wages have increased due to incentives and across the board raises given, my salary as an engineering graduate (Which has been financed for another 10 years) has not increased to keep pace with hourly personnel or previous engineers with the same employment time.

FUTURE: As a company looking for a successful candidate would ask: "Where do you see yourself in

5 years." I ask this question of NAS. Where is NAS going to be in 5 years? Where is Eric Thompson going to be in 5 years?

MANAGEMENT: I encourage you to ask some questions, when you look around at your top managers today. Who possesses the leadership, communication skills, motivational skills, who are the strong problem solvers, and who provides independent contributions to lead NAS for the next 5 years? Who would be the next general V.P. today? If your managers would not make a good V.P. Why not? Is today's management cut out for tomorrow?

ENGINEER COMITMENT: I am surprised to see engineers being replaced by less qualified personnel. You can't legally call yourself a doctor or lawyer in this country unless you are, but everyone seems to be an engineer. I also would like to see a licensed professional engineer in our department, which is a requirement to work under, before also becoming licensed.

PETITIONER'S BRIEF

FILED
SEP 3 - 2010
OFFICE OF THE CLERK

No. 09-291

In The Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTIONS PRESENTED

Section 704(a) of Title VII forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The questions presented are:

(1) Does section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party, such as a spouse, family member or fiancé, who is closely associated with the employee who engaged in such protected activity?

(2) If so, may that prohibition be enforced in a civil action brought by the third party victim?

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OPINIONS BELOW

The June 5, 2009 en banc opinion of the Court of Appeals, which is reported at 567 F.3d 804 (6th Cir.2009) (en banc), is set out at pp. 1a-63a of the Petition Appendix. The March 31, 2008 panel opinion of the Court of Appeals, which is reported at 520 F.3d 644 (6th Cir.2008), is set out at pp. 64a-90a of the Petition Appendix. The December 18, 2006 order and opinion of the District Court for the Eastern District of Kentucky, which is not reported, is set out at pp. 91a-94a of the Petition Appendix. The June 20, 2006 opinion and order of the District Court, which is reported at 435 F.Supp.2d 633 (E.D.Ky.2006), is set out at pp. 95a-109a of the Petition Appendix.

STATEMENT OF JURISDICTION

The decision of the Court of Appeals was entered on June 5, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). This court granted certiorari on June 29, 2010.

STATUTES INVOLVED

Section 704(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-3(a), provides in pertinent part:

> It shall be an unlawful employment practice for an employer to discriminate against any

> of his employees ... because he has opposed any practice, made an unlawful employment practice under this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Section 706(b) of Title VII, 42 U.S.C. § 2000e-5(b), provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved ... alleging that an employer ... has engaged in an unlawful employment practice, the Commission shall ... make an investigation thereof.

Section 706(f)(1) of Title VII, 42 U.S.C. 2000e-5(f)(1), provides in pertinent part:

> If a charge filed with the Commission pursuant to section (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge ... the Commission has not filed a civil action under this section ... , the Commission ... shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

At the time when this action arose, Eric Thompson was an employee of North American Stainless, LP, as was Miriam Regalado. Thompson and Regalado were engaged to be married,[1] and "their relationship was common knowledge at North American Stainless." (Pet. App. 66a). In September 2002 Regalado filed a charge with the Equal Employment Opportunity Commission, asserting that her supervisors had discriminated against her based on her gender. Regalado alleged that she had twice been demoted because of her gender, and that for the same unlawful reason she was paid less than a male employee.[2]

On February 13, 2003, the EEOC notified North American Stainless of Regalado's charge. On February 27, 2003, Thompson's supervisors were directed to prepare a memorandum indicating that Thompson was to be dismissed.[3] On March 7, 2003, barely three weeks after receiving the notice of Regalado's charge, North American Stainless dismissed Thompson. Thompson alleges that he was fired in retaliation for his then-fiancée's (now wife's) EEOC charge. (Pet. App. 3a-4a).

---

[1] Thompson and Regalado were subsequently married.

[2] Notice of Charge of Discrimination, JA 16-18.

[3] Doc. 15-6, at 5-7, 21-22. Thompson had received a performance-based wage increase only three months earlier. Doc. 15-11, at 7.

Thompson himself filed a timely charge with the EEOC,[4] which conducted an investigation and found "reasonable cause to believe that [the defendant] violated Title VII." (Pet. App. 4a).[5] After conciliation efforts were unsuccessful, the EEOC issued a right-to-sue letter and Thompson brought this action against North American Stainless. Thompson's complaint alleged that the employer had dismissed him in retaliation for his then-fiancée's EEOC charge.[6] Retaliating in that way, Thompson asserted, violated section 704(a) of Title VII, which forbids an employer to "discriminate against any of his employees ... because he has ... made a charge ... under this title." 42 U.S.C. § 2000e-3(a).

North American Stainless moved for summary judgment, contending that as a matter of law

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[4] Charge of Discrimination, Doc. 20-4 ("I believe I was discharged because my fiancee filed a charge of discrimination against the company").

The EEOC "Initial Investigation Information Sheet" filled out by Thompson asserted that he had been fired because his "employer knew of status of relationship [with Regalado] and future marriage. By firing, the others would be intimidated from doing the same (EEOC claim)." Doc. 15-9 at 6.

[5] Determination, Doc. 15-4, at 1 ("Evidence obtained during the investigation supports Charging Party's allegations that the Respondent retaliated against him by discharging him because his fiance had filed a charge of discrimination.").

[6] JA 12, ¶ 9 ("When the Defendant received notice that Miriam Regal[a]do had filed an EEOC charge against it based on gender discrimination, the Defendant retaliated against Plaintiff by terminating him....").

reprisals against a third party would not "support a Title VII cause of action."[7] The District Court granted the motion and dismissed Thompson's complaint, holding that Title VII "does not permit third party retaliation claims." (Pet. App. 108a).[8]

A divided panel of the Sixth Circuit initially overturned the dismissal of the complaint. (Pet. App. 64a-90a). The court of appeals granted North American Stainless' petition for rehearing en banc. A splintered en banc court upheld the dismissal of Thompson's complaint. In addition to the majority opinion, there was a separate concurring opinion and three dissenting opinions.

The problem of reprisals against third parties is not limited to Title VII. Virtually all major federal statutes governing the employment relationship prohibit employers from retaliating against employees for engaging in certain specified protected activity. The question of whether third party reprisals are forbidden and redressable has arisen under a wide variety of those statutes: the National Labor Relations Act,[9] the Americans With Disabilities

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[7] North American Stainless's Memorandum in Support of Motion for Summary Judgment, Doc. 12, 5.

[8] The District Court subsequently denied a motion to reconsider its decision in light of this Court's decision in *Burlington Northern & Santa Fe Ruy Co. v. White*, 548 U.S. 53 (2006). (Pet. App. 91a-94a).

[9] See pp. 18-19, 23, *infra*.

Act,[10] the Age Discrimination in Employment Act,[11] the Occupational Safety and Health Act,[12] the Family and Medical Leave Act,[13] the Rehabilitation Act,[14] ERISA,[15] the Equal Pay Act,[16] the Whistleblower Protection Act,[17] the Federal Mine Safety and Health Act,[18] Title IX,[19] and 42 U.S.C. § 1981.[20]

This Court granted review to address these recurring issues.

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[10] *Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561 (3d Cir.2002).

[11] *Id.*

[12] *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir.1994).

[13] *Elsensohn v. Parish of St. Tammany*, 2007 WL 1799684 (E.D.La.2007).

[14] *Mutts v. Southern Connecticut State University*, 2006 WL 1806179 (D.Conn.2006).

[15] *Fitzgerald v. Codex Corp.*, 882 F.2d 586 (1st Cir.1989).

[16] *Marshall v. Georgia Southwestern College*, 489 F.Supp. 1322, 1331 (M.D.Ga.1980).

[17] *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 447 (1991).

[18] *Secretary of Labor v. Leeco, Inc.*, 24 FMSHRC 589, 591, 2002 WL 31412752 at *3 (F.M.S.H.R.C.).

[19] *Dawn L. v. Greater Johnstown School Dist.*, 586 F.Supp.2d 332, 380 (W.D.Pa.2008).

[20] *Allen-Sherrod v. Henry County School Dist.*, 2007 WL 1020843 at *3 (N.D.Ga.2007).

SUMMARY OF ARGUMENT

I. Section 704(a) forbids an employer "to discriminate against any of his employees because he ... has made a charge ... under this title." Third party reprisals fall within the language of that prohibition; those reprisals are a method of retaliating against the person who engaged in protected activity. The employer in this case clearly "discriminate[d]" against Regalado for having filed a Title VII charge when it selected Regalado (and *her* fiancé Thompson) for adverse action, and did so "because" Regalado had filed "a charge" with the EEOC.

The prohibitions of section 704(a) are not limited to any particular type of retaliatory act. Congress undoubtedly anticipated that third party reprisals could be among the forms of retaliation to which employers might resort. "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1087 (7th Cir.1987).

The EEOC has consistently interpreted section 704(a) to forbid third party reprisals. The agency's construction of the statute, rooted in an intensely practical understanding of the obstacle which retaliation poses to the administration of Title VII, is entitled to significant deference.

The core purpose of section 704(a) is to maintain "unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346

(1997). Fear of third party reprisals can easily prevent a worker from complaining to or cooperating with federal officials. The district court below correctly recognized that "retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against." (Pet. App. 108a).

Interpreting section 704(a) to forbid third party reprisals is consistent with the holding in *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), that section 704(a) bans retaliation which is "likely to dissuade employees from complaining or assisting in complaints about discrimination."

II. Section 706(f)(1) authorizes a plaintiff such as Thompson, the direct victim of a third party reprisal, to maintain an action to redress the injuries he suffered as a consequence of the violation of Regalado's rights.

Section 706(f)(1) provides that "a civil action may be brought ... by the person claiming to be aggrieved." In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), this Court held that the phrase "person aggrieved" in the 1968 Fair Housing Act encompasses all individuals with Article III standing. *Trafficante* expressly relied on the construction which had been given to the words "person ... aggrieved" in section 706(f)(1). Person aggrieved should be accorded the same interpretation in both statutes.

Independent of this language in section 706(f)(1), in the instant case Thompson meets the requirements for third party standing. Thompson has clearly suffered a concrete injury in fact as a result of his dismissal. Thompson has a "close relationship" with Regalado (his then fiancée and now wife), the individual whose rights were violated. And Regalado herself would at the least face a serious hindrance if she brought suit on her own and attempted to obtain redress for the injuries suffered by Thompson.

The court of appeals acknowledged that Thompson was a person aggrieved under section 706(f)(1). The Sixth Circuit clearly erred in holding nonetheless that Thompson does not have a cause of action under Title VII. Section 706(f)(1) addresses precisely this issue, expressly stating that "a civil action may be brought" by a person aggrieved. Section 704(a) does not limit the cause of action provided by section 706(f)(1); section 704(a) addresses only what conduct is unlawful, not who can file suit to redress injuries caused by a violation.

ARGUMENT

I. THIRD PARTY REPRISALS VIOLATE SECTION 704(a) OF TITLE VII

A. The Terms of Section 704(a) Prohibit Third Party Reprisals

Third party reprisals fall squarely within the Title VII prohibition against retaliation. Section

704(a) forbids an employer "to discriminate against any of his employees because he ... has made a charge ... under this title." 42 U.S.C. § 2000e-3(a). The touchstone of the prohibition in section 704(a) of Title VII is the intent of the employer in taking the allegedly retaliatory action. That provision forbids an employer to retaliate "because" an individual "has made a charge." 42 U.S.C. § 2000e-5(a). That is precisely the motive alleged by Thompson: "I was discharged because my fiancee filed a charge of discrimination against the company."[21] The employer in this case clearly "discriminate[d]" against Regalado for having filed a Title VII charge when it selected Regalado (and *her* fiancé) for that adverse action, and did so because Regalado had "made a charge" under Title VII.

Petitioner claims that North American Stainless dismissed him as the *method* of retaliating against Regalado.[22] Such third party reprisals violate the section 704(a) rights of the individual – here Ms. Regalado – who filed a charge or engaged in protected activity; dismissing Thompson was "the very means by which" the employer retaliated against Regalado.

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[21] Charge of Discrimination, Doc. 20-4.

[22] See Pet. App. 57a (White, J., dissenting) (employer was "discriminating against the opposing employee through the vehicle of firing that employee's co-employee [fiancé]."); Pet. App. 43a (Moore, J., dissenting) (employer allegedly was "retaliating through Thompson against Thompson's then fiancée/now wife Miriam Regalado").

Blue Shield of Virginia v. McCready, 457 U.S. 465, 479 (1982).

The protections of section 704(a) are not limited to any particular form or type of retaliation. Section 704(a) does not contain an exclusive list of the types of retaliatory practices forbidden by Title VII; indeed, section 704(a) does not mention any specific methods of retaliation at all. Rather than attempt to fashion a list of specified forbidden retaliatory actions, thus protecting workers only from the listed (but not all) retaliatory tactics, Congress in section 704(a) broadly forbade any "discriminat[ion]" because an employee had engaged in protected activity. The sweeping scope of that prohibition differs from a number of other federal anti-retaliation statutes, which by their terms do apply only to certain specified types of retaliatory tactics.[23] By instead framing section 704(a) without

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[23] E.g., 10 U.S.C. § 950t(24) (authorizing trial by military tribunal of a covered individual "who intentionally kills or inflicts great bodily harm on one or more protected persons ... to retaliate against government conduct"); 10 U.S.C. § 1034(b) ("No person may take (or threaten to take) an unfavorable personnel action, or withhold (or threaten to withhold) a favorable personnel action, as a reprisal against a member of the armed forces for [engaging in certain protected activity]"); 18 U.S.C. § 115(a) (forbidding assault, murder, or certain other specified crimes of violence "to retaliate against [a federal] official, judge, or law enforcement officer on account of the performance of official duties"); 18 U.S.C. § 1513(a)(1) (forbidding killing or attempting to kill any person to retaliate for appearing as a witness or party or providing information to federal law enforcement officials); 18 U.S.C. § 1513(b) (forbidding conduct that "causes bodily injury to another person or damages the tangible property of another person" in order to retaliate for appearing as a witness or party

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any such limitations, Congress made clear its intent to forbid "the many forms that effective retaliation can take." *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 64 (2006).

The breadth of section 704(a) reflects the gravity of the times in which it was enacted.[24] In the period

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or providing information to federal law enforcement officials); 18 U.S.C. § 1521 (forbidding the "fil[ing] ... of ... any false lien or encumbrance against the real or personal property [of certain officials] on account of the performance of official duties by that individual"); 26 U.S.C. § 7804(b)(6) (requiring dismissal of an employee of the Internal Revenue Service for "violations of the Internal Revenue Code of 1986, Department of Treasury regulations, or policies of the Internal Revenue Service ... for the purpose of retaliating against ... a taxpayer"); see 116 Stat. 3242, sec. 102(1) ("Federal agencies should not retaliate for court judgments or settlements relating to discrimination and whistleblower laws by targeting the claimant or other employee with reductions in compensation, benefits, or workforce to pay for such judgments or settlements").

For example, federal law prohibits only certain specified types of retaliation against federal law enforcement officials; an embittered convicted felon is forbidden to assault or kidnap a law enforcement official, but could lawfully refuse to hire that official after the official retired. See 18 U.S.C. § 115.

[24] In 1949, at the behest of Thurgood Marshall, the Reverend J.A. DeLaine enlisted twenty parents in Clarendon County, South Carolina, to file suit challenging the separate and unequal public schools for black children.

> Before it was over, they fired him from the little schoolhouse at which he taught devotedly for ten years. And they fired his wife and two of his sisters and a niece. And they threatened him with bodily harm. And they sued him on trumped-up charges and convicted him in a kangaroo court and left him with a judgment that denied him credit from any bank. And

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leading up to the adoption of Title VII, hostility towards civil rights workers and racial integration had reached dangerous levels throughout much of the South. Homes and churches had been bombed. Civil rights workers had been murdered. Crosses had been set aflame to create an atmosphere of intimidation. Two Presidents had been required to call up the National Guard to protect African-American students who wanted to attend previously all-white schools. Fear of reprisals was deterring many African-Americans from attempting to exercise their legal and constitutional rights. In that dangerous environment, Congress understandably framed section 704(a) in sweeping language intended to eliminate root and branch the use of threats and retaliation to obstruct implementation of the promise of equal employment opportunity in the Civil Rights Act of 1964.

The terms of the anti-retaliation provision of section 704(a) are deliberately broader than the

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> they burned his house to the ground while the fire department stood around watching the flames consume the night. And they stoned the church at which he pastored. And fired shotguns at him out of the dark.... Soon after, they burned his church to the ground....
>
> All of this happened because he was black and brave. And because others followed when he had decided the time had come to lead.

R. Kluger, Simple Justice, at 3 (1975).

The lawsuit which Reverend DeLaine helped to organize, *Briggs v. Elliott*, was consolidated on appeal with similar actions from Virginia, Delaware and Kansas and was decided by this Court sub nom. *Brown v. Board of Education*, 347 U.S. 483 (1954).

language of the anti-discrimination provision of section 703(a). The reprisals forbidden by section 704(a) are not limited to actions affecting the employment of the particular individual who engaged in the protected activity. *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53, 66-67 (2006). Section 703(a), on the other hand, imposes just such a restriction on discrimination claims. In a discrimination claim under section 703(a) a plaintiff must show not only that the action complained of was motivated by the plaintiff's race, color, religion, sex or national origin, but also that that discrimination adversely affected the plaintiff's *own* employment.

> It shall be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or discharge any individual, or otherwise to discrimination against any individual with respect to *his* compensation, terms, conditions, or privileges of employment, because of *such individual's* race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect *his* status as an

> employee, because of *such individual's* race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (emphasis added). The emphasized words in section 703(a) limit the scope of that provision to cases in which the plaintiff's protected status is the basis for an adverse action related to his own employment status. No similar restriction is found in the terms of section 704(a). This linguistic difference indicates that Congress intended its different words to make a legal difference.

> We normally presume that, where words differ as they differ here, "'Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983).

Burlington Northern, 548 U.S. at 63.

Retaliation is "against" a worker who engaged in protected activity even where the employer's action achieves its unlawful purpose by affecting another worker or individual. See *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088-89 (7th Cir.1987) (dismissal of mother of male shop steward was "[a]n effective method of getting at him, a protected worker"; "[i]f he loves his mother, this had to hurt him as well"). The law has long recognized that injury to one individual can cause emotional distress for a family member or other associated individual, and that such consequent

injury may at times be the very purpose of an intentional tort. State tort law has in varying circumstances provided redress in such circumstances for that emotional distress. D. Dobbs, The Law of Torts, 833-37 (2000); see Doc. 15-8, at 23 (Dep. of Eric Thompson) ("It's been a huge emotional tribulation for both of us").

It is of no consequence that the employer in this case allegedly retaliated against Regalado indirectly, by firing Thompson, rather than directly, by firing Regalado herself. Either type of reprisal would "discriminate against" Regalado. "Section 704(a)['s] ... broad based protection should not be undermined by allowing the [employer] to accomplish indirectly what it cannot accomplish directly." (EEOC Decision No. 77-343, 1977 WL 5345, at *1). Surely section 704(a) would be violated if an employer applied a policy of kidnapping the children of any worker who filed a charge with the EEOC. If indirect retaliatory methods were permitted by section 704(a), there would be any number of ways in which an ingenious employer could lawfully punish and deter protected activity. For example, at a plant with a seniority system, an employer could eliminate the job of one worker knowing that he or she in turn would use seniority to displace some other employee whom the employer wished to harm.

Congress undoubtedly anticipated that third party reprisals would be among the forms of retaliation to which employers might resort. "To retaliate

against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1087 (7th Cir.1987). Such reprisals against an individual's family or close associates have a long and deplorable history as a method of punishing enemies, deterring conduct, and coercing disclosure of information, and remain all too common in events both at home and abroad.[22]

Congressional awareness of this type of retaliation is reflected in legislation forbidding crimes of

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[22] H.R.Rep. 111-166 at 173 (recommending approval of special immigration visas for Iraqi citizens who assisted coalition forces "at great risk to themselves or their families"); H.R.Rep. 106-487(I) at 21 (traffickers met women at airport and "threatened to kill their families if the women refused to dance nude in a nightclub"); H.R.Rep. 105-508 at 36 ("prudence dictates that if former or current CIA personnel are threatened with harm, the protection provided to them should, in appropriate circumstances, be extended to their immediate families as well"); H.R.Rep. 105-258 at *2 ("Police and prosecutors report an increased incidence of threats of physical violence against victims, witnesses, and their families.... In many cities there are as many requests for protection of threatened family members as there are for protection of witnesses themselves."); H.R.Rep. 90-658 at *4 ("Experience has evidenced that potential witnesses or their families are often intimidated, threatened, or even gravely injured during the investigative preliminaries to a criminal prosecution"). See *Wilson v. Libby*, 535 F.3d 697 (D.C.Cir.2008).

violence against federal officials; those prohibitions also apply to crimes against the families of those officials. Section 115 of the criminal code, for example, makes it a federal offense to murder or assault

> the immediate family of a United States official ... with intent to impede, intimidate, or interfere with such official ... on account of the performance of official duties....

18 U.S.C. § 115(a)(1).[26] Congress enacted the Taft Hartley Act in part because it found that if a union

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[26] Similarly, section 115(a)(2) declares it a crime to murder or assault the immediate family of a person who formerly served as a United States official "with intent to retaliate against such person on account of the performance of official duties during the term of service of such person." 18 U.S.C. § 115(a)(2).

> Section 119 forbids the public release of restricted personal information about [jurors, witnesses, and certain government officials], or a member of the immediate family of that covered person, ... with the intent and knowledge that the restricted personal information will be used to threaten, intimate, or facilitate the commission of a crime of violence against ... a member of the immediate family of that covered person.

18 U.S.C. § 119(a).

The prohibition against retaliatory killings in section 1513 is even broader; it applies without limitation to the murder of

> another person with intent to retaliate against any person for ... the attendance of a witness or party at an official proceeding ... or ... providing to a law enforcement officer any information relating to the commission ... of a Federal offense....

18 U.S.C. § 1513(a)(1).

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member opposed corrupt union officials he faced reprisals, including having "his family threatened." 105 Cong. Rec. 6472 (1959); 2 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, p. 1098 (1959). See *Gray v. Netherland*, 518 U.S. 152, 155 (1996) (armed kidnapper threatened to harm family of store manager if he did not cooperate with robbery); *Herrera v. Collins*, 506 U.S. 390, 398 n.4 (1993) (potential witness assertedly silenced by threats of harm to his family).

Since at least 1962 the National Labor Relations Board has interpreted the National Labor Relations Act to forbid reprisals against third parties because of protected activities by union members, officials or supporters.

> A restraint on the exercise of employee rights is readily apparent where ... the supervisor is discharged because she is the wife of an employee who has engaged in union or other protected activities.... Under these circumstances, the rank-and-file employees ... can

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Section 1951 defines "robbery" to include the unlawful taking or obtaining of personal property from the person ... against his will, by means of fear of injury, immediate or future, to ... the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining

18 U.S.C. § 1951(b)(1).

> "reasonably ... fear that the employer would take similar action against them if they continued to support the Union." *Jackson Tile Manufacturing Co.* [122 NLRB 764 (1958)].

Golub Bros. Concessions, 140 NLRB 120, 127 (1962).[27] This Court has repeatedly relied on the established interpretation of the NLRA in construing Title VII. See *Burlington Northern*, 548 U.S. at 66 ("[t]he National Labor Relations Act, to which this Court has 'drawn analogies ... in other title VII contexts.' *Hishon v. King & Spaulding*, 467 U.S. 69, 76, n.8 (1984)").[28]

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[27] In *United Automobile, Aircraft and Agricultural Implement Workers of America v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956), the union had "threatened [workers] and their families with physical injury" if they worked during strike. 351 U.S. at 269. This Court noted that "the alleged conduct of the union in coercing employees in the exercise of their rights is a violation of section 8(b)(1) of th[e NLRA.]" 351 U.S. at 270.

[28] In concluding that section 704(a) forbids third party reprisals, the EEOC itself has correctly relied on the NLRB's interpretation of the NLRA. EEOC Decision No. 77-343, 1977 WL 5345 at *1 ("The National Labor Relations Board in similar circumstances has frequently held that discrimination against an employee because he or she has a familial relationship with a union activist violates the National Labor Relations Act. *Illinois Bell Telephone Company*, 228 NLRB 114 (1977); *Hickman Garment Company*, 216 NLRB 801 (1975); *Forest City Containers, Inc.*, 212 NLRB 38 (1974). Accordingly, we conclude that discrimination against an employee because he or she has a familial relationship with a person who has filed a charge of discrimination is violative of Section 704(a) of Title VII.").

B. The EEOC's Interpretation of Section 704(a) Is Entitled To Deference

The EEOC has long and consistently interpreted section 704(a) to forbid an employer to retaliate against a worker who engaged in protected activity by inflicting reprisals on a relative or other associated individual.

The Commission has applied this interpretation in a series of administrative determinations and adjudications dating from 1977.[29]

> Certainly, where it can be shown that an employer discriminated against an individual because he or she was related to a person who filed a charge, it is clear that the employer's intent is to retaliate against the person who filed the charge.... [D]iscrimination against an employee because he or she has a familial relationship with a person who has filed a charge of discrimination is violative of Section 704(a) of Title VII.

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[29] EEOC Decision 77-343, 1977 WL 5345 (EEOC); see *Ray v. TVA*, 1982 WL 532146 at *3-*4 (EEOC) (applying *De Medina v. Reinhardt*, 444 F.Supp. 573 (D.D.C.1979)); *Bates v. Widnall*, No. 01963655, 1997 WL 332902 (EEOC June 10, 1997) ("[I]t is long settled that third party reprisals are cognizable under EEOC law"); *Alexander v. Peters*, No. 05980788, 2000 WL 1218139 (EEOC).

(EEOC Decision No. 77-343, 1977 WL 5345 at *1). Since 1984[30] the Commission's Compliance Manual has stated that third party reprisals violate section 704(a). The current version of the compliance manual states:

> The retaliation provisions of Title VII, the ADEA, the EPA and the ADA prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage

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[30] Section 614.4(b) of the 1984 Compliance Manual provided:

> [T]he retaliation provisions of Title VII prohibit retaliation against someone so closely related to the person exercising his/her Title VII rights that it would discourage or prevent the person from exercising those rights.... For example, where the son or daughter of an employee protests unlawful employment practices, the respondent may try to retaliate against the employee.

Section 614.3 of the 1988 Compliance Manual provided:

> When investigating a retaliation violation it must first be determined whether a covered respondent has discriminated against an individual because ... someone closely related to that individual has opposed what (s)he reasonably believes to be Title VII or ADEA discrimination or has participated in the Title VII or ADEA process.... [A]s to both opposition and participation, the retaliation provisions of Title VII and the ADEA ... prohibit retaliation against someone so closely related to the person exercising his/her statutory rights that it would discourage or prevent the person from exercising those rights.

> or prevent the person from pursuing those rights. For example, it would be unlawful for a respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge.

2 EEOC Compliance Manual § 8.II(B)(3)(c) (1998). The Commission has repeatedly advanced that same interpretation of section 704(a) by filing suit on behalf of the victims of third party reprisals[31] and by submitting amicus briefs in support of private lawsuits raising such claims.[32]

The Commission's longstanding construction of section 704(a) is of substantial importance. This Court has repeatedly recognized that the Commission's interpretation of Title VII "reflect[s] a body of experience and informed judgment to which courts and litigants may properly resort for guidance" *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399

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[31] *EEOC v. Wal-Mart Stores, Inc.*, 576 F.Supp.2d 1240 (D.N.Mex.2008) (retaliation against children because of protected activity of mother); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206 (E.D.Cal.1998) (retaliation against brother because of protected activity of sister); *EEOC v. V & J Foods, Inc.*, 2006 WL 3203713 (E.D.Wis.2006) (retaliation against daughter because of protected activity of mother).

[32] Brief of the EEOC as Amicus in Support of Thompson and for Reversal, *Thompson v. North American Stainless, LP*, (No. 07-5040) (6th Cir.), available at 2007 WL 2477626; Brief of the EEOC as Amicus Curiae in Support of the Appellant, *Fogelman v. Mercy Hosp.*, (No. 00-2263) (3d Cir.), available at 2001 WL 34119171.

(2008).[33] Because, as this Court noted in *Burlington Northern*, the proper application of section 704(a) turns in part on an evaluation of the deterrent consequences of particular forms of retaliation, the Commission's assessment of this intensely practical issue, reflecting the Commission's extensive experience with the fears and concerns of countless Charging Parties over several decades, is entitled to especial weight. See *Robinson*, 519 U.S. at 345-46 (noting position of EEOC that excluding former employees from the protections of section 704(a) "would undermine the effectiveness of Title VII").

The EEOC is not alone in construing federal anti-retaliation statutes in this manner. The NLRB has applied this interpretation of the NLRA in cases in which the injured third party was a non-supervisory employee, a supervisory employee, and an independent contractor.[34] The Department of

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[33] See *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S.Ct. 846, 851 (2009); *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440, 449 n.9 (2003); *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501, 518 (1986); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

[34] *Advertisers Mfg. Co.*, 280 NLRB 1185, 1186 (1986) (retaliation against mother because of protected activities of son); *International Union of Operating Engineers, Local 400*, 265 NLRB 1316, 1320 (1982) (retaliation against wife for protected activities of husband; independent contractor); *Hickman Garment Co.*, 216 NLRB 801 (1975) (retaliation against daughter-in-law because of protected activities of mother-in-law); *American*

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Labor has repeatedly construed in the same manner the federal employment laws which it enforces. In *Reich v. Cambridgeport Air Systems, Inc.*, the Department of Labor advanced a similar construction of the anti-retaliation provision of the Occupational Health and Safety Act. The Department relied on precedents regarding section 704(a) and the NLRA in arguing that the anti-retaliation provision of OSHA forbids third party reprisals.[35] The Department interprets the anti-retaliation provision of the Federal Mine Safety and Health Act in the same way, there too relying on cases holding that third party reprisals violate the NLRA and Title VII.[36] In *Marshall v. Georgia Southwestern College*, 489 F.Supp. 1322 (M.D.Ga.1980), the Department argued that the anti-retaliation provision of the Fair Labor Standards Act, which applies to the Equal Pay Act, forbids an employer to force a male employee to resign his position because his wife had filed a complaint about discrimination in compensation.

Buslines, Inc., 211 NLRB 947, 948 (1974) (retaliation against wife for protected activities of husband); *Forest City Containers, Inc.*, 212 NLRB 38, 40 (1974) (retaliation against worker because of protected activity of her fiancé's mother); *Ridgely Mfg. Co.*, 207 NLRB 83, 88-89 (1973) (retaliation against wives because of protected activities of husbands).

[35] Brief for the Secretary of Labor, *Reich v. Cambridgeport Air Systems, Inc.*, (1st Cir.1994) (No. 93-2287) at 18-21, available at 1994 WL 16506060.

[36] *Secretary of Labor v. Leeco, Inc.*, 24 FMSHRC 589, 591, 2002 WL 31412752 at *3 (F.M.S.H.R.C.).

As this Court noted in *Burlington Northern*, "Congress has provided similar kinds of protection from retaliation in comparable statutes." 548 U.S. at 66 (citing Title VII and the NLRA). Although there are some textual differences among these statutes, the government's construction of these various laws reflects a consistent concern that permitting third party reprisals would reduce access to remedial mechanisms, impair the willingness of employees to contact or provide information to federal agencies, and thus undermine enforcement of the underlying substantive provisions. Interpreting these anti-retaliation provisions in a similar manner, except where unambiguous textual differences compel some distinction, would be consistent with the congressional understanding that comparable federal provisions would be construed alike.

C. Applying Section 704(a) To Third Party Reprisals Advances The Purposes of That Provision

Interpreting the terms of section 704(a) to forbid third party reprisals is important to assuring that the anti-retaliation provision will be effective in protecting workers who file charges or engage in other covered activities. In this respect the "purpose [of section 704(a)] reinforces what language already indicates." *Burlington Northern*, 548 U.S. at 64; see *Robinson*, 519 U.S. at 849 (where language of section 704(a) is ambiguous, Court adopts construction that

is "more consistent with the broader context of Title VII and the primary purpose of § 704(a)").

"Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington Northern*, 548 U.S. at 67. Because most charging parties (and most witnesses) would be employees of the employer alleged to have violated Title VII, that employer usually has the economic power to deter or punish those who complain to or cooperate with the Commission.

> [T]he anti-retaliation provision's "primary purpose," [is] "[m]aintaining unfettered access to statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).
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> * * *
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> "Plainly effective enforcement could thus only be expected if employees felt free to approach officials with their grievances." *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960). Interpreting the anti-retaliation provision to provide broad protection from retaliation helps assure the cooperation upon which accomplishment of the Act's primary objective depends.
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> * * *
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> The anti-retaliation provision seeks to prevent employer interference with "unfettered access" to Title VII's remedial mechanisms. *Robinson* [*v. Shell Oil Co.*,] 519 U.S. [337,] 346 [(1997)].

Burlington Northern, 548 U.S. at 64-68; see *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (purpose of the NLRA anti-retaliation provision is to ensure employees are "'completely free from coercion against reporting'" unlawful practices) (quoting *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967)). Preventing all forms of retaliation is particularly important in light of "documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'" *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S.Ct. 846, 852 (2009) (quoting Brake, Retaliation, 90 Minn. L. Rev. 18, 20, 37 and n.58 (2005)).

The deterrent effect of third party reprisals is widely recognized. The district judge in this case, although concluding that Sixth Circuit precedent barred any action for third party reprisals, candidly recognized that "retaliating against a spouse or close associate of an employee will deter the employee from engaging in protected activity just as much as if the employee were himself retaliated against." (Pet. App. 108a).

> There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights.
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> * * *
>
> [A]ction taken against the third party employee can have the effect of coercing the

> employee engaged in protected activity, and may also coerce other employees of the company from engaging in protected activity in the future.

Fogelman v. Mercy Hospital, Inc., 283 F.3d 561, 568-70 and n.5 (3d Cir.2002); *Holt v. JTM Industries, Inc.*, 89 F.3d 1224, 1233 (5th Cir.1996) (Dennis, J., dissenting) ("the threat of retaliatory action against a family member or friend is a substantial deterrent to the free exercise of rights protected under the ADEA").[37] Indeed, as the EEOC has observed,

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[37] See *Rainer v. Refco, Inc.*, 464 F.Supp. 742, 746 (S.D.Ohio 2006) ("[c]learly, if an employer were free to discharge any relative of an employee who complained about discrimination without fear of liability, there would be a chilling effect on the inclination of employees whose relatives were part of the same workforce to complain about discrimination"); *EEOC v. Nalbandian Sales, Inc.*, 36 F.Supp.2d 1206, 1210 (E.D.Cal.1998) ("an interpretation [that permitted third party reprisals] would chill employees from exercising their Title VII rights against unlawful employment practices out of fear that their protected activity could adversely jeopardize the employment status of a friend or relative"); *Clark v. R.J.Reynolds Tobacco Co.*, 1982 WL 2277 at *7 (E.D.La.) ("[p]laintiff's son would certainly be deterred from exercising his rights under Title VII if there was a threat that his former employer would fire his father if he were to file a charge of discrimination against it"); *De Medina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C.1978) ("tolerance of third-party reprisals would, no less than tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII").

threats of reprisals against third parties can be especially efficacious.[38]

In *Burlington Northern* this Court cited as an example of "effective[ ] retaliat[ion] against an employee ... causing him harm outside the workplace" the reprisal in *Rochon v. Gonzalez*, 438 F.3d 1211, 1213 (D.C.Cir.2006), in which the FBI retaliation against the plaintiff "took the form of the FBI's refusal ... to investigate death threats a federal prisoner made against [the Special Agent] and *his wife*." 548 U.S. at 63-64 (emphasis added and omitted). It is inconceivable that in a situation such as *Rochon* section 704(a) permits a government agency to retaliate against a law enforcement officer who filed a charge with the EEOC by refusing to protect his family from death threats, so long as the agency

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[38] Brief of the EEOC as Amicus Curiae In Support of the Appellant, *Fogelman v. Mercy Hosp.*, (No. 00-2263) (3d Cir.) at 25-26.

> [T]he fact that retaliation is against a third party only enhances the pressure on the employee contemplating the exercise of protected activity. Where an employee has already been the target of discrimination, the threat of economic sanction may be outweighed by the employee's personal desire to vindicate her statutory rights. If the employer, however, could reach into the workforce to target other employees, the aggrieved employee may be more reluctant to assert her statutory rights. In that case, the employee risks not only her own economic future, which has already been threatened by the employer, but the future of her fellow workers as well.

continues to protect the officer himself. In assessing whether the retaliatory actions against the plaintiff in *Burlington Northern* itself were sufficiently serious to be unlawful, the Court expressly considered the impact of that retaliation on the family of the worker involved, as well as on the worker herself.[39]

The chilling effect of third party reprisals is at least usually one of the very purposes of that form of retaliation. If third party reprisals are permissible under section 704(a), "employers can use Thompson, and others like him, as swords to keep employees from invoking their statutory rights with no redress for the harms suffered by those individuals." (Pet. App. 43a-44a) (Moore, J., dissenting). In the absence of an enforceable prohibition against that practice, employers could deliberately

> evade the reach of the [anti-retaliation] statute by making relatives or friends of complaining parties the "whipping boys" for the protected conduct of others.

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[39] Cf. 548 U.S. at 72:

> White *and her family* had to live for 37 days without income. *They* did not know during that time whether or when White could return to work. White described to the jury the physical and emotional hardship that 37 days of having "no income, no money" in fact caused.... (" ... No income, no money, and that made *all of us* feel bad ... ")

(Emphasis added).

Holt v. JTM Industries, Inc., 89 F.3d at 1233 (Dennis, J., dissenting). As the EEOC has warned, if third party reprisals are not prohibited – or if any such prohibition is incapable of meaningful enforcement – an employer could adopt an express policy of inflicting such reprisals.

> [A]n employer could openly use the threat of third-party retaliations to ban the very activities protected by Section 704(a). An employer could adopt a policy of seeking reprisals in any case in which an employee protested discrimination, filed a charge with the Commission, or otherwise participated in the enforcement process. That policy could require the termination of any relative, friend, or co-worker of the individual engaging in the protected activity.[40]

In *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir.1987), the Seventh Circuit held that reprisals against supervisory officials violate the NLRA because "[i]f, as the Board found ... , the company fired [the mother] because of her son's union activities, there could be only one *purpose*, and that was to intimidate union supporters."[41] (Emphasis added).

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[40] Brief of the Equal Employment Opportunity Commission as Appellant, *EEOC v. Ohio Edison Co.*, (No. 92-3173) (6th Cir.), text at n.1.

[41] In *Reich v. Cambridgeport Air Systems, Inc.*, 26 F.3d 1187 (1st Cir.1994), the First Circuit upheld a retaliation claim under OSHA regarding the dismissal of a worker who was a "particularly close friend[ ]" of a worker who had complained about

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Unredressed third party reprisals could be a powerful deterrent to protected activity. In the wake of the dismissal of petitioner Thompson, and of the Sixth Circuit decision that followed, any worker of ordinary prudence at North American Stainless could be understandably reluctant to file a charge with the EEOC. Effective redress for the victims of third party reprisals is thus essential to remove the chilling effect that such a reprisal would have on other workers. *NLRB v. Advertisers Mfg. Co.*, 823 F.2d at 1088-89 ("[The mother] is ... being reinstated so that ... protected employees will not be deterred from exercising their rights ... by fear that if they do the company will try to get back at them in any way it can, including firing their relatives."); *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 410 (3d Cir. 1990) (en banc) ("reinstatement [of the dismissed family member] was ordered to demonstrate to the employees and supervisors at Kenrich that our labor laws do not permit employers to intimidate protected employees by using family members as hostages."). To deny judicial redress to those third party victims

> would encourage employers to take reprisals against the friends, relatives, and colleagues of an employee who ha[s] asserted a [discrimination] claim. Through coercion, intimidation, threats, or interference with an

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health and safety problems. That reprisal, the trial court had concluded, was inflicted to "'impress the other employees' not to associate with health and safety advocates." 26 F.3d at 1189.

> employee's co-workers, an employer could discourage an employee from asserting such a claim.

Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 630, 660 A.2d 505, 508 (1995).

D. The Standard In *Burlington Northern* Controls Which Third Party Reprisals Are Unlawful

This Court's decision in *Burlington Northern* provides the standard for determining when a third party reprisal sufficiently implicates the purpose of section 704(a) to violate the law. A particular retaliatory practice is forbidden by section 704(a) if "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern*, 548 U.S. at 67 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C.Cir.2006)); see 548 U.S. at 70 (reprisal unlawful if it is "likely to dissuade employees from complaining or assisting in complaints about discrimination").

Consistent with the standard in *Burlington Northern*, the EEOC has concluded that third party reprisals are unlawful if the adverse action is taken "against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights." 2 EEOC Compliance Manual § 8.II(B)(3)(c) (1998). The retaliatory act itself must also be sufficiently serious to satisfy the *Burlington*

Northern standard. "[N]ormally petty slights, minor annoyances, and simple lack of good manners will not create such deterrence." *Burlington Northern*, 548 U.S. at 68.

II. SECTION 706(f)(1) AUTHORIZES SUITS BY THE VICTIMS OF THIRD PARTY REPRISALS

A. Victims of Third Party Reprisals Are "Persons ... Aggrieved" Within The Scope of Section 706(f)(1)

The retaliatory action alleged in this case violated the rights of Regalado, the individual whose action in filing a charge with the EEOC was protected by section 704(a). Section 706(f)(1) of Title VII authorizes Thompson, the immediate victim of that retaliation, to maintain this action to redress the injuries which he suffered as a consequence of the violation of Regalado's rights.

Section 706(f)(1) provides that when certain exhaustion requirements have been satisfied "a civil action may be brought against the respondent named in the charge ... by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). The court below correctly concluded, as have most courts of appeals to address this issue,[42] that by using the phrase "person

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[42] *Anjelino v. The New York Times Co.*, 200 F.3d 73 (3d Cir.2000); *Kyles v. J.K. Guardian Sec. Services, Inc.*, 222 F.3d 289, 296 (7th Cir.2000); *Horne v. Firemen's Retirement System of*

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... aggrieved" in section 706(f)(1) Congress authorized suit by any plaintiff with Article III standing, thus lifting the usual prudential rule limiting standing to individuals whose own rights have been violated. "[T]he 'person claiming to be aggrieved' language of § 2000e-5 shows a congressional intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution." (Pet. App. 10a n.1).

In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), this Court held that the phrase "person aggrieved" in the Fair Housing Act of 1968 encompasses all individuals with Article III standing.[43] The decision in *Trafficante* expressly relied on a construction of those same words in section 706 of Title VII.

> *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (CA 3), which dealt with the phrase that allowed a suit to be started "by a person claiming to be aggrieved" under the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a),

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St. Louis, 69 F.3d 233, 235 (8th Cir.1995); *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1278 (D.C.Cir.1994).

[43] History associates the word "aggrieved" with a congressional intent to cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which "prudential" standing traditionally rested. *Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4 (1942); *FCC v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940).

FEC v. Atkins, 524 U.S. 11, 20 (1998).

> concluded that the words used showed "a congressional intention to define standing as broadly as is permitted by Article III of the constitution." *Id.* at 446. With respect to suits brought under the 1968 Act, we reach the same conclusion....

409 U.S. at 366-67 (footnote omitted).

Trafficante concluded that this broad reading of "person aggrieved" in the Fair Housing Act was supported by the structure of that statute.

> The design of the Act confirms this construction. HUD has no power of enforcement. So far as federal agencies are concerned only the Attorney General may sue; yet ... he may sue only to correct "a pattern or practice" of housing discrimination. That phrase "a pattern or practice" creates some limiting factors in his authority.... Since HUD has no enforcement powers and since the enormity of the task of assuring fair housing makes the role of the Attorney General in the matter minimal, the main generating force must be private suits.... We can give vitality to [the provision authorizing suit by a person aggrieved] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities....

Trafficante, 409 U.S. at 210-12. Those same practical considerations were applicable to Title VII at the time that statute, including section 706(f)(1), were

originally enacted. Under the terms of the 1964 Civil Rights Act, the EEOC itself had no authority to initiate litigation,[44] and the Department of Justice could file suit only to redress "a pattern or practice" of violations of Title VII.[45] Thus a broad authorization of private suits was as essential under Title VII of the 1964 Civil Rights Act as it was under the Fair Housing Act.

In framing civil rights legislation, Congress has repeatedly authorized lawsuits by "persons aggrieved," a legislative choice reflecting the unique importance and difficulty of enforcing these laws. In the 1964 Civil Rights Act itself Congress authorized persons "aggrieved" to enforce the public accommodations provision in Title II, 42 U.S.C. § 2000a-3(a). Suits by persons "aggrieved" were also authorized by the 1967 Age Discrimination in Employment Act, 29 U.S.C. § 626(c)(1), and the Rehabilitation Act Amendments of 1973. 29 U.S.C. § 794a. Subsequently both the 1991 Americans With Disabilities Act and

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[44] In 1972 Congress amended Title VII to authorize the EEOC to file suit to enforce Title VII. See 42 U.S.C. § 706(f)(1).

[45] The limited authority of the Department of Justice to bring pattern or practice actions under the Fair Housing Act of 1968 was undoubtedly modeled on the similar provision in section 707(a) of Title VII. 42 U.S.C. § 2000e-6. The first thirty-seven words of 42 U.S.C. § 3614(a), authorizing pattern or practice suits by the Attorney General, are taken verbatim from section 707(a) ("Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this....").

the Genetic Information Nondiscrimination Act of 2008 incorporated by reference the remedial provisions (including the "person aggrieved" provision of section 706(f)(1)) of Title VII. 42 U.S.C. §§ 2000ff-6(a)(1), 12117(a).

The EEOC construes Title VII to authorize action by the immediate victim of a third party reprisal, as well as by the employee whose protected activities triggered that reprisal. 2 Compliance Manual §§ 8-I(B) ("[A charging party] can ... challenge retaliation by a respondent based on ... protected activity by someone closely related to or associated with the charging party"), 8-II(B)(3)(c) (1998) ("[r]etaliation against a close relative can be challenged by both the individual who engaged in protected activity and the relative, where both are employees"). The Commission's construction of section 704(a) is to weight.

B. Thompson Satisfies The Standards for Third Party Standing

The Court need not rely on the "person ... aggrieved" provision in section 706(f)(1) to conclude that Thompson may bring this action. Independent of those words in section 706(f)(1), the circumstances of this case fall within the well established standard permitting suit by certain individuals injured by actions violating the rights of third parties.

A party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."

Warth v. Seldin, 422 U.S. 490, 499 (1975). This Court "has not treated this rule as absolute, however, recognizing that there may be circumstances where it is necessary to grant a third party standing to assert the rights of another." *Kowalski v. Tesmer*, 543 U.S. 125, 129-30 (2004). A party seeking third-party standing must make three showings.

> We have recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an "injury in fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute, ... ; the litigant must have a close relation to the third party, ... ; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Singleton v. Wulff, 428 U.S. 106, 114-15 (1976).[46] All three of those requirements are met here.

First, Thompson indisputably suffered an injury in fact, having been dismissed from a position as a metallurgical engineer which he had held for seven years. Thompson was unemployed for a year after

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[46] *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998); *Georgia v. McCollum*, 505 U.S. 42, 55 (1992); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991); *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 956 (1984); *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991).

that dismissal.[47] Thompson and Regalado were married shortly after his termination, and had to live apart for nearly a year when Thompson was forced to move to another city to find comparable employment.[48] Thompson testified that the resulting forced separation from his wife was a "huge hardship for our marriage."[49] The injury to Thompson was not an incidental and indirect consequence of some economic harm done to Regalado. Precisely to the contrary, it was Thompson himself who suffered the immediate injury caused by the retaliatory dismissal; injuring Thompson was the means by which the employer sought to punish Regalado. "[T]he harm [to Thompson] was the intended consequence of the unlawful practice (albeit an intermediate harm in path to the ultimate goal of harming Regalado)...." (Pet. App. 58a (White, J., dissenting); see Pet. App. 51a ("North American Stainless harmed Thompson in order to effectuate this retaliation [against Regalado]") (Moore, J. dissenting). Thompson clearly has a concrete interest in the monetary and injunctive relief sought in this action.

Second, there undeniably was a "close relationship" between Thompson and his then fiancée Regalado; by the time this lawsuit was filed, Thompson and Regalado were married.[50] The relationship of

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[47] Doc. 15-8 (Thompson Dep.), at 17.

[48] *Id.* at 14, 23.

[49] *Id.* at 23.

[50] JA 10, ¶ 1.

husband and wife is certainly closer than the relationships this Court has previously held sufficient to satisfy this element. E.g., *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998) (relationship of criminal defendant to prospective grand jurors); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 619 (1991) (relationship of civil litigant to prospective jurors); *Powers v. Ohio*, 428 U.S. 400, 410-11 (1991) (relationship between criminal defendant and prospective jurors); *Craig v. Boren*, 429 U.S. 90 (1976) (relationship of liquor store to purchasers of alcoholic beverages under the age of twenty-one); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (relationship between family planning advocate and women to whom he provided birth control materials). "[T]here can be no doubt that [Thompson] will be a motivated, effective advocate for the ... rights [of Regalado]." *Powers v. Ohio*, 499 U.S. at 414.[51]

This Court has repeatedly recognized standing in situations such as this in which the defendant's action "'*against the litigant* would result indirectly in the violation of third parties' rights.'" *Kowalski*, 543 U.S. at 131 (emphasis in original) (quoting *Warth*, 422 U.S. at 510). The denial of relief to victims of third party reprisals, such as Thompson, "may 'materially impair the ability of' third persons in

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[51] See *Singleton*, 428 U.S. at 115 (question is whether "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter.")

[Regalado's] position to exercise their rights." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623 n.3 (1989) (quoting *Baird*, 405 U.S. at 445); see *Craig*, 429 U.S. at 196; *Baird*, 405 U.S. at 446.

Third, this is clearly a situation in which "there exists some hindrance to the third party's ability to protect its own interests." *Georgia v. McCollum*, 505 U.S. at 55; see *Kowalski*, 543 U.S. at 130 ("whether there is a 'hindrance' to the possessor's ability to protect his own interests") (quoting *Powers*, 499 U.S. at 411). Where such a hindrance exists, "the third party's absence from the court loses its tendency to suggest that his right is not truly at stake, or truly important to him, and the party who is in court becomes by default the right's best available proponent." *Singleton*, 428 U.S. at 115.

If Regalado herself were to file suit, Article III would at the least pose a serious obstacle to obtaining any of the relief needed to redress the injuries caused by the unlawful third party reprisal against Thompson. Regalado would have considerable difficulty establishing the requisite Article III standing to seek an award of backpay or damages payable to Thompson. The core standing requirement imposed by Article III is that a plaintiff have a personal stake in the outcome of a particular claim. "To demonstrate standing, a plaintiff must have 'alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'" *Salazar v. Buono*, 130 S.Ct. 1803, 1814 (2010)

(quoting *Horne v. Flores*, 557 U.S. ___, ___, 129 S.Ct. 2479, 2592 (2009) (emphasis in original)). A plaintiff's hope that a relative or close friend will receive a monetary award or a job is not such a "personal stake." If Mr. Thompson had been injured in an accident, Ms. Regalado obviously would not have had the requisite "personal stake" in whether a court might award damages payable to her fiancé or husband. A litigant only has standing to seek "remediation of its own injury," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998), not remediation of harms done to others. Standing is determined by the identity of the party to whom a court orders that monetary relief be paid. It does not "matter what the [plaintiff] do[es] with the money afterward." *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, ___, 128 S.Ct. 2531, 2543 (2008). For similar reasons, Regalado would have serious difficulty establishing Article III standing to seek an injunction directing that Thompson be reinstated.[52]

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[52] See *De Medina v. Reinhardt*, 444 F.Supp. 573, 580 (D.D.C.1978) ("while plaintiff's husband might be in a position to seek injunctive relief to prohibit future reprisals against his spouse, he would certainly not be in a position to seek back pay and/or retroactive promotion based on spouse's employment denial"); *Smith v. Frye*, 488 F.3d 263, 272-73 (4th Cir.2007) (son who engaged in protected activity lacks Article III standing to obtain redress for mother injured by third party reprisal); Pet. App. 43a n.5 (Moore, J., dissenting) ("Regalado's ability to sue in this matter does not solve the instant problem because the relief Regalado would be able to seek would appear to differ substantially from the relief that

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Regalado would presumably have Article III standing to obtain an injunction against future third party reprisals, if she could show, for example, that she had relatives who also worked for North American Stainless. But such prospective relief would do nothing to redress the harm caused by the past violation, or to remove the chilling effect of Thompson's dismissal.

The procedural provisions of Title VII present a second obstacle to enforcement of the prohibition against third party reprisals by the individual who engaged in protected activity. A plaintiff cannot bring suit under Title VII unless he or she has first filed a charge with the EEOC. But it would rarely if ever occur to most couples (or family members) that if one of them is the victim of a third party reprisal, the *other* employee is the person required to complain to the EEOC. Limiting redress to those rare instances in which an employee who engaged in protected activity somehow figured out that she, not the direct victim of the reprisal, was supposed to file a Title VII charge would usually be a fatal obstacle "in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman Co.*, 440 U.S. 522, 527 (1972).[53]

Thompson can seek. Specifically, it is unclear whether Regalado would be able to sue to have Thompson reinstated.").

[53] See *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 402 (2008) ("a remedial scheme in which laypersons, rather than

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C. Section 704(f)(1) Provides a Cause of Action for "Persons ... Aggrieved"

The court below assumed that section 704(a) forbids third party reprisals, and acknowledged that Thompson is a "person aggrieved" under section 706(f)(1). It insisted, however, that Title VII does not provide Thompson with a "cause of action" to redress his injuries. (Pet. App. 8a, 9a and n.1, 27a). Whether a plaintiff has a cause of action under Title VII, the court of appeals reasoned, turns on whether he or she "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." (Pet. App. 9a (quoting *Davis v. Passman*, 442 U.S. 228, 239 n.18 (1979)). Thompson, the court below concluded, lacked "a cause of action under § 704(a)." (Pet. App. 9a, 9a n.1).

The issue in *Davis*, however, was whether the courts should infer the existence of a cause of action to enforce the Constitution in the absence of any applicable statutory cause of action.[54] *Davis* explained that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the

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lawyers, are expected to initiate the process") (quoting *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 124 (1988)).

[54] Section 1983 provides such a statutory cause of action where state and local officials have violated federal constitutional rights. *Davis*, however, concerned an alleged constitutional violation by federal officials. See *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

constitution" 442 U.S. at 241 (emphasis in original). "Statutory rights and obligations are established by Congress, and it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition, who may enforce them and in what manner." *Id.* *Davis* thus concerns only the standard the courts would use in deciding who could sue in the *absence* of a statutory cause of action.

But the question of which "class of litigants may ... invoke the power of the court" to enforce Title VII is squarely answered by the unambiguous terms of section 706(f)(1), which states that "a civil action may be brought ... by the person claiming to be aggrieved." 42 U.S.C. § 2000e-5(f)(1). Section 706(f)(1) creates an express cause of action[18] to obtain judicial redress, and spells out which individuals are accorded that cause of action: those persons who are "aggrieved" by the asserted violation. Once a plaintiff establishes that he or she is "aggrieved" within the meaning of section 706(f)(1), the inquiry as to whether he or she has a cause of action is at an end. There is thus no need to inquire (as did the court below) whether, in the absence of the express cause of action under section 706(a)(1), the courts would infer a "cause of

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[18] See *Smith v. Casellas*, 119 F.3d 33, 34 (D.C.Cir.1997) ("the private right of action provided for in section 706(f)(1)"); *Etemad v. United States*, 1993 WL 114831 at *1 (9th Cir.) ("[t]he private right of action ... under section 706(f)(1)"); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349, 1351 (5th Cir.1977) ("section 706(f)(1)'s ... private cause of action").

action under 704(a)." The courts are not at liberty to engraft additional requirement onto section 706(f)(1), or to limit the cause of action provided by that provision to only some, but not all, "person[s] ... aggrieved."

The court of appeals asserted that "[s]ection 704(a) ... limits the class of claimants" who are afforded the right to sue for retaliation. (Pet. App. 27a). That is simply incorrect. Section 704(a) addresses only *what* conduct constitutes forbidden retaliation; section 704(a) does not even purport to address *who* can file suit to enforce that prohibition.[56] The "class of claimants" who are afforded the right to sue – for retaliation or any other violation of Title VII – is set out instead in section 706(f)(1), which requires only that a private plaintiff be "aggrieved." Similarly, the statutory authorization of suits by EEOC and the Department of Justice to enforce section 704(a) is found, not in section 704(a), but in sections 706(f)(1) and 707(a). If section 704(a) limited the parties

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[56] See Pet. App. 30a (Rogers, J., concurring) ("[Section 704(a)] dictates what practices amount to unlawful retaliation, not who may sue.... The question of who may sue is simply not addressed by [section 704(a)]. Rather, the procedural provisions of Title VII provide that 'person[s] claiming to be aggrieved' and 'person[s] aggrieved' may sue for Title VII violations. [§§ 706(b), 706(f)(1)]"); 56a (White, J., dissenting) ("[T]he plain language of § 704(a) is addressed to declaring that particular conduct by an employer constitutes an unlawful employment practice. Contrary to the majority's characterization, the statutory language does not tell us '*who* falls under the umbrella of its protection,' ... but rather, *what* conduct is prohibited.") (emphasis in original).

authorized to enforce that provision to the persons who had engaged in protected activity, it would bar suits by the Department of Justice and by the EEOC.

CONCLUSION

For the above reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 09-291

Supreme Court, U.S.
FILED
OCT 22 2010
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IN THE

Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

The anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a) [section 704(a)], forbids an employer from discriminating against an employee because he or she engaged in protected conduct. At the time of his dismissal from employment, Petitioner had not engaged in any protected conduct under Title VII, although his fiancée at the time had. The questions presented are:

(1) Whether discrimination occurs under the anti-retaliation provision of Title VII when an employer discharges an employee who has not engaged in protected conduct, but who is closely associated with another employee who engaged in the protected conduct.

(2) If the employer's action above constitutes discrimination under the anti-retaliation provision, whether the discharged employee, who did not engage in any protected conduct, may pursue a cause of action for retaliation under Title VII's anti-retaliation provision.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent North American Stainless, formerly known as North American Stainless LP, pursuant to Supreme Court Rule 29.6, hereby discloses that, as of October 22, 2010, it is a general partnership with no parent corporation. The managing general partner of North American Stainless is Stainless Steel Invest, Inc., a Delaware corporation which is not a publicly held corporation. The only other partner of North American Stainless is Stainless Alloys, Inc., a Delaware corporation, which is not a publicly held corporation. The two partners of North American Stainless are owned by North American Stainless, Inc., a Delaware corporation, which is owned by Acerinox S.A., shares of which are publicly traded on the Madrid Stock Exchange.

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STATEMENT OF THE CASE

The question presented in this case is whether Eric Thompson, who is not a protected party and did not engage in any protected activity, may pursue a claim for discrimination under Title VII's anti-retaliation provision. On June 20, 2006, the United States District Court for the Eastern District of Kentucky granted summary judgment to North American Stainless against Eric Thompson on his Title VII retaliation claim based solely upon this question of law. Despite Thompson's attempt to depict North American Stainless as an unfair and retaliatory employer, there are no factual findings by a jury or the district court to support such self-serving allegations. The district court and the Sixth Circuit Court of Appeals assumed Thompson's allegations of retaliation to be true for purposes of ruling on the purely legal question presented below.

Thompson was discharged from his employment as a metallurgical engineer with North American Stainless on March 7, 2003. Thompson's discharge followed his submission of an unsolicited memorandum to a senior level executive of North American Stainless. App. 22-23, Record 12, Exhibit C to North American Stainless Motion for Summary Judgment. This memorandum was derogatory to North American Stainless' management practices. Thompson's supervisors testified in their depositions that Thompson was discharged due to this memorandum and his poor performance. Record 16-3, Eric Hess depo. 126, Record 16-9, Anil Yadav depo. 109-110.

Thompson's Complaint does not allege that he was discharged because he engaged in any protected activity

or due to his race, color, religion, sex or national origin. Instead, Thompson claims to be protected under Title VII by virtue of his "close association" with his then fiancée, Miriam Regalado. Regalado had filed a charge of discrimination with the EEOC against North American Stainless before Thompson's discharge. Thompson's Complaint alleges that his "relationship with Miriam [Regalado] Thompson was the sole motivating factor in his termination." App.12-13.

The EEOC did not find any basis to support Miriam Regalado's initial charge of discrimination against North American Stainless. The EEOC issued a "Dismissal and Notice of Rights" statement to Miriam Regalado dated September 8, 2003. App. 19-21. After investigating Regalado's charge of discrimination, the EEOC was "unable to conclude that the information obtained established a violation of the statutes." App. 19-21.

Miriam Regalado filed a second charge of discrimination with the EEOC after Thompson's discharge.[1] The EEOC dismissed Regalado's second charge as well. Resp. App., Regalado depo. 44, Exh. 4 Neither the EEOC nor Miriam Regalado pursued any claims against North American Stainless based upon

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1. In her deposition, Miriam Regalado provided different accounts of the basis for the second charge of discrimination that she filed against North American Stainless. She first testified that the second charge alleged retaliation. She then claimed that the second charge was for hostile work environment. She finally conceded that she could not recall the basis for the second charge. Resp. App, Regalado depo. 45, 48, 49. In either event, the charge was dismissed by the EEOC. Resp. App., Regalado depo. Exh. 4.

Regalado's charges. Regalado continued working for North American Stainless until January 2004, when she voluntarily resigned. Resp. App., Regalado depo. 9.

According to Regalado, the issue of whether Thompson's discharge was due to her relationship with Thompson came first from her EEOC investigator, not from Thompson. Resp. App., Regalado depo. 59. Thompson did not initiate discussions with the EEOC regarding his discharge. *Id.* Rather, Regalado's investigator voluntarily sent Thompson the "paper work" to file the EEOC charge which led to this case. *Id.*

Thompson is asserting the rights of Regalado under the anti-retaliation provision, and not his own. Pet. Br. 39-40. Prior to Thompson's discharge, he never complained of discriminatory treatment of himself or his co-workers, including his then fiancée Miriam Regalado. He never filed a charge of discrimination (written or verbal) or testified in any proceedings. He did not oppose any practices of North American Stainless which were alleged to be discriminatory. If he participated in any investigation proceedings on behalf of Regalado, he did not advise North American Stainless that he had done so.

Thompson's Complaint alleges a violation of Title VII's substantive and anti-retaliation provisions, as set forth in 42 U.S.C. § 2000e-2(a) and 42 U.S.C. 21 § 2000e-3, respectively. Thompson asked the district court to allow him to pursue a retaliation claim despite his lack of protected activity because of his "close association" with Regalado. The district court determined that Thompson was not in a protected category and thus

could not pursue a claim under Title VII's substantive provision. The district court also held that Thompson failed to state a cause of action for retaliation under 42 U.S.C. § 2000e-3 because Thompson had not engaged in any protected activity. Pet. App. 108a. The district court granted summary judgment in favor of North American Stainless. Thompson has not appealed the dismissal of his substantive discrimination claim under 42 U.S.C. § 2000e-2(a). He has only appealed the dismissal of his retaliation claim under 42 U.S.C. § 2000e-3.

On Thompson's initial appeal to the Sixth Circuit Court of Appeals, the issue was framed as whether "Title VII prohibit[s] employers from taking retaliatory action against employees not directly involved in protected activity, but who are so closely related to or associated with those who are directly involved, that it is clear that the protected activity motivated the employer's action[.]" Pet. App. 68a. The panel majority recognized that the plain language of the statute indicates that the only individual protected by 704(a) is the one who conducted the protected activity, but concluded that given Title VII's remedial scheme the literal reading of the statute should not be followed and that Thompson could pursue a cause of action for retaliation under 704(a).[2]

North American Stainless filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. The Petition was granted and the full Sixth Circuit Court of Appeals reviewed Thompson's "friends and family"

2. The author of the panel majority's decision was a district court judge who was sitting by designation. Pet. App. 65a.

association argument. In a lengthy and divisive opinion, the summary judgment against Thompson and dismissal of his retaliation claim was affirmed. App. 64a-90a.

The majority of the *en banc* Sixth Circuit Court of Appeals described the issue before the Court as "whether § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity." Pet. App. 2a. A majority of the *en banc* court held that "[b]ecause Thompson does not claim that he personally engaged in any protected activity, we affirm the judgment of the district court granting summary judgment in favor of defendant North American Stainless, LP." *Id.* at 2-3a.

The majority recognized that Thompson, not Regalado, is the plaintiff in this case and that Thompson did not engage in any protected conduct. The majority further recognized that the plain text of the anti-retaliation provision limits the class of persons entitled to seek protection under that section to persons who engage in statutorily protected activity. Pet. App. 7a. The Court of Appeals declined Thompson's "invitation to rewrite the law" and affirmed the district court's award of summary judgment to North American Stainless. *Id.* at 9a. Thompson now asks this Court to rewrite the anti-retaliation provision to allow third persons to bring retaliation claims based solely upon their relationship with a protected party.

Thompson never argued in any of the proceedings below that he could pursue his retaliation claim under Title VII's enforcement provision, 42 U.S.C. § 2000e-

5(f), as a "person aggrieved." Thompson presents this issue for the first time to this Court. Likewise, the "prudential standing" analysis of *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), was not presented to the lower courts or briefed by the parties. Thompson and the EEOC, as his amicus, argued that the protection of the anti-retaliation provision should be broadened to include "close associations" of protected parties, not that Thompson could pursue his claim as a "person aggrieved." Thompson should be barred from raising this issue for the first time at this final appellate level.

SUMMARY OF ARGUMENT

Eric Thompson seeks to recover under Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a). This Court clearly stated in *Burlington N. & Sante Fe Ry. v. White*, 548 U.S. 53 (2006), that Title VII's anti-retaliation provision protects employees based upon their conduct. Thompson admits that he did not engage in any protected conduct, however. He seeks refuge as a "close association" of a third-party who engaged in the protected conduct. Thompson's attempt to broaden the scope of Title VII's anti-retaliation provision is not supported by the language of the statute or this Court's clear expression in *Burlington*. Broadening the statute to the extent argued by Thompson would rewrite the statute to create a cause of action not established by Congress. The impact of rewriting the statute will be far reaching and wreak havoc on employers' legitimate needs to implement lawful warranted discipline. The decision of the court of appeals should be affirmed.

1. This Court determined in *Burlington* that Title VII's "anti-retaliation provision seeks to prevent harm to individuals based upon what they do, i.e., their conduct." *Burlington*, 548 U.S. at 63. Thompson does not allege to be a member of a class of persons protected by Title VII. He did not engage in any protected conduct. He relies solely upon his relationship with his fiancée. Thompson alternatively argues that he is a "person aggrieved" under Title VII because he was injured by the alleged retaliation.

2. The express language of the anti-retaliation provision of Title VII provides an employee the right to be free from discrimination because that employee engaged in protected conduct. The plain language requires a connection between the alleged discrimination and the protected conduct in order for the discrimination to be deemed unlawful. Plaintiffs asserting third-party associations are not persons who have engaged in protected conduct and, hence, are not the persons against whom the retaliation is directed. If Congress had intended to grant protection to every conceivable injured person, Congress could have defined "aggrieved persons" to include "any person injured" by a violation of the statute as it did in the Fair Housing Act. Congress did not extend the broad definition to Title VII.

3. Thompson's concern that employers will be free to retaliate against family members if third-party associations are not afforded protection is unfounded. Regalado could have, but chose not to, pursue a retaliation claim under Title VII. She engaged in protected conduct and, according to Thompson, was the

intended target of the alleged retaliation. The summary judgment of the district court left Regalado's right to pursue a retaliation claim intact.

4. The majority of the lower courts addressing this issue have refused to recognize third-party retaliation claims as valid causes of action. The Third, Fifth and Eighth Circuits have each considered this issue in the context of either Title VII or the similarly worded Age Discrimination in Employment Act. Each of the courts determined that third-party retaliation claims were not permitted under Title VII. These courts recognized some of the negative practical implications from broadening the scope of the statute, including (a) opening the door to frivolous lawsuits, (b) interfering with an employer's prerogative to discipline at-will employees, and (c) creating uncertainty as to which persons have standing to pursue retaliation claims based upon close associations.

5. As recognized by the appellate courts addressing this issue, there will be a significant negative impact to employers if third-party associations are afforded protection under the anti-retaliation statute. Title VII retaliation claims are the fastest growing category of claims filed with the EEOC. Under Thompson's approach, employees who claim a close association will be entitled to automatic job protection. Employers will be left to guess which relationships are entitled to protection or forced to inquire into the sensitive nature of relationships when making necessary disciplinary actions. Courts will also be left guessing which relationships are afforded protection, and mini-trials to determine this issue will necessarily result from this expansion.

6. The issue of whether Thompson may proceed as a "person aggrieved" under Title VII is not properly before this Court. Thompson never raised this issue below. Thus, North American Stainless never had the opportunity to address the issue before the court of appeals. Thompson should not be allowed to raise this issue for the first time at this final appellate level.

7. Title VII's enforcement provision does not apply to "any injured person." It applies to "the person aggrieved" by a violation of the statute. Because Thompson has not been discriminated against based upon his conduct, as prohibited by the anti-retaliation provision, he is not "aggrieved" under the statute. Thompson's reliance upon *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), and *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982), is misplaced. The plaintiffs in those cases alleged that their rights under the statutes in question had been violated. Thompson does not make that allegation; he only claims to have been injured by the violation of Regalado's rights. Moreover, the statutes at issue in those cases defined the term "person aggrieved" to include "any person injured." Title VII does not contain that broad definition.

8. Prudential standing jurisprudence limits Thompson's right to pursue a claim based upon an alleged violation of his fiancee's rights. Thompson has not shown that the anti-retaliation provision provides him – as a non-protected party – the right to pursue a claim for judicial relief for violation of the statute.

9. The burden shifting analysis set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), is well-established. Third-party retaliation claims are not consistent with this framework. Under *McDonnell Douglas*, the plaintiff is required to show that he is in a protected category as the first element of a prima facie case. Here, however, Thompson completely avoids this element. Presumably, the plaintiff would have to show that someone was a protected party and show that there was a close relation with that person. As set forth above, however, Thompson has not offered any guidance as to what relationships would be afforded protection or what standard should be applied.

10. The issue of whether Thompson's discharge violated the retaliation standard under *Burlington* is not properly before this Court. The issue of unlawful retaliation was presumed by the district court and court of appeals. Further, it is not necessary to resolve this question in order to address the issue in this appeal of whether Thompson may pursue a cause of action for retaliation.

11. The EEOC Compliance Manual is not entitled to deference. The EEOC Compliance Manual has not been submitted to public comment and scrutiny. Moreover, courts that have evaluated the specific portion of the Manual relied upon by Thompson have rejected its interpretation of the anti-retaliation provision.

ARGUMENT

I. THE PURPOSE OF TITLE VII'S ANTI-RETALIATION PROVISION IS TO PROTECT EMPLOYEES WHO EXERCISE THEIR RIGHTS UNDER TITLE VII; THOMPSON IS NOT A MEMBER OF THAT CLASS.

This Court determined in *Burlington Northern & Sante Fe Rwy. Co. v. White*, 548 U.S. 53 (2006), that Title VII's "anti-retaliation provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender based status." *Id.* at 63. The Court further recognized the anti-retaliation provision's design to secure that objective: "[T]he anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Id.* Consistent with this stated purpose, there are two distinct protections against discrimination provided to employees in Title VII. The first is contained in the substantive provision, 42 U.S.C. § 2000e-2(a), and the second is set forth in the anti-retaliation provision, 42 U.S.C. § 2000e-3(a). "The substantive provision seeks to prevent injury to individuals based upon who they are, i.e., their status. The anti-retaliation provision seeks to prevent harm to individuals based upon **what they do, i.e., their conduct.**" *Burlington*, 548 U.S. at 63 (emphasis added). The protection of the anti-retaliation provision has also been described as "a prophylactic measure to guard the primary right." *CBOS West, Inc. v. Humphries*, 553 U.S. 442, 462-63 (2008)(Thomas, J., dissenting) (quoting

Jackson v. Birmingham Board of Education, 544 U.S. 167, 189 (2005)). *See also Great American Fed. Sav.& Loan Ass'n v. Novotny*, 442 U.S. 366, 287 (1979) (White, J., dissenting)(recognizing that the "right under § 704(a) [is] to be free from retaliation for efforts to aid others asserting Title VII rights").

Eric Thompson does not allege to be a member of a class of persons protected by Title VII. Thompson does not allege that he was discriminated against due to his race, gender, national origin, or religion, i.e., his status. Likewise, he does not allege to have been discriminated against based upon any actions he took, i.e., his conduct. Thompson did not undertake any "efforts to secure or advance enforcement" of any provision of Title VII. He did not engage in any of the activities which are deemed to be protected activities under the anti-retaliation provision. He did not oppose any unlawful employment practice under Title VII. He did not make a charge of discrimination under Title VII. He did not testify, assist or participate in any investigation, hearing or proceeding. Thompson relies solely upon his relationship with a protected party as the basis for his Title VII anti-retaliation provision.

The risk of efforts to broaden the scope of retaliation claims to include claims made by close associations was foreshadowed by Justice Thomas' dissent in *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). Justice Thomas cautioned:

> The Court establishes a prophylactic enforcement mechanism designed to encourage whistleblowing about sex discrimination. The language of Title IX does

> not support this holding. The majority also offers nothing to demonstrate that its prophylactic rule is necessary to effectuate the statutory scheme. Nothing prevents students-or their parents-from complaining about inequality in facilities or treatment. [citations omitted] Under the majority's reasoning, courts may expand liability as they, rather than Congress, see fit. This is no idle worry. **The next step is to say that someone closely associated with the complainer, who claims he suffered retaliation for those complaints, likewise has a retaliation claim under Title IX. See 2 Equal Employment Opportunity Commission, Compliance Manual § 8-11, p. 8-10 (1998) ("It would be unlawful for respondent to retaliate against an employee because his or her spouse, who is also an employee, filed an EEOC charge").**

Id. at 195 (Thomas, J., dissenting, joined by Scalia and Kennedy, JJ.)(emphasis added). In this case, Thompson relies upon the same passage from the EEOC Compliance Manual in support of his claim that Title VII permits third-party associations to pursue retaliation claims based upon the protected conduct of another employee. Pet. Br. 22-23.

Expansion of Title VII's anti-retaliation provision to include a cause of action for close associations is not consistent with the statute's express language, nor is the expansion necessary to effectuate the statutory scheme of the anti-retaliation provision. Thompson recognizes the absence of rights afforded to third-party

associations under the anti-retaliation provision. Hence, he relies upon the enforcement mechanism set forth in 42 U.S.C. § 2000e-5 as the basis to pursue his claim. This conflation of the enforcement mechanism with the substantive right is not supported by the statute's text. *Cf. Jackson*, 544 U.S. at 189 (Thomas, J., dissenting) (holding that the majority had conflated the enforcement provision of Title IX with the substantive provision by allowing retaliation claim under Title IX). Additionally, the negative impact to employers of providing automatic job protection to employees based upon their "close association" should be considered a part of the determination of whether the statute should be expanded.

II. THE EXPRESS LANGUAGE OF THE ANTI-RETALIATION PROVISION PROVIDES AN EMPLOYEE THE RIGHT TO BE FREE FROM AN EMPLOYER'S DISCRIMINATION BECAUSE THE EMPLOYEE ENGAGED IN PROTECTED CONDUCT; CLOSE ASSOCIATIONS ARE NOT PROTECTED BY THE EXPRESS LANGUAGE.

The plain language of the anti-retaliation provision does not provide a cause of action to an employee based upon his association with a protected party. The plain language provides a cause of action to employees who engage in protected conduct. The wording of the anti-retaliation provision is consistent with the stated purpose in *Burlington* that the legislative intention of 42 U.S.C. § 2000e-3(a) is to protect employees based upon their conduct. Thompson's attempt to fashion a cause of action for himself requires the Court to look beyond the plain language of the statute.

The issue of whether a statutory cause of action exists presents a question of statutory construction. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). This Court has clearly rejected the notion that a person who is harmed by the violation of a statute has an automatic right to pursue a cause of action under the violated statute. *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979) ("[T]he fact that a federal statute has been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person."). "Instead, [the Court's] task is solely limited to determining whether Congress intended to create the private right of action asserted by [the plaintiff]." *Touche*, 442 U.S. at 568. *See also Cannon*, 441 U.S. at 689 (holding that the "threshold question" to be answered is "whether the statute was enacted for the benefit of a special class of which the plaintiff is a member.")

The question of whether the anti-retaliation provision was enacted for the benefit of close associations, as alleged by Thompson, was answered by this Court in *Burlington*. The "anti-retaliation provision seeks to prevent harm to individuals based upon **what they do, i.e. their conduct**." *Burlington*, 548 U.S. at 63 (emphasis added). Persons like Thompson alleging close associations do not seek protection based upon their conduct. Because Thompson cannot establish that the anti-retaliation provision was enacted to benefit him, his attempt to broaden the statute should be rejected.

The statutory language of the anti-retaliation provision supports the *Burlington* conclusion that the anti-retaliation provision protects parties based upon

their conduct, not upon their associations. *See Touche*, 442 U.S. at 568 (recognizing that "as with any case involving the interpretation of a statute, our analysis must begin with the language of the statute itself."). The anti-retaliation provision provides as follows:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . **because he has opposed** any practice made an unlawful employment practice by this subchapter, or **because he** has **made** a **charge**, **testified**, **assisted**, or **participated** in any manner in an investigation, proceedings, or hearing under this subchapter.

42 U.S.C. § 2000e-3(a) (emphasis added). The plain language of the statute requires a connection between the alleged discrimination and the protected conduct in order for the discrimination to be deemed unlawful under this provision. The use of the conjunction "because" clearly links the two elements. *See Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2350 (2009) ("The words 'because of' mean 'by reason of: on account of.' 1Webster's Third New International Dictionary 194 (1966); see also 1 Oxford English Dictionary 746 (1933) (defining 'because of' to mean 'By reason *of*, on account *of*' (italics in original)); The Random House Dictionary of the English Language 132 (1966) (defining 'because' to mean 'by reason; on account')). Thompson ignores this plain language, however.

In *Crawford v. Metropolitan Government Ass'n of Nashville and Davidson County*, 129 S.Ct. 846 (2009), this Court described the first clause of the anti-retaliation provision as the "opposition clause" and the second clause as the "participation clause." These descriptions recognize that the statute contemplates action on the part of the protected party and some connection between the employer's alleged retaliation and the employee's protected conduct. Justice Alito cautioned in his concurring opinion that providing protection to a person who is "silent" in their opposition would "open the door to retaliation claims by employees who never expressed a word of opposition to their employers." *Id.* at 854 (Alito, J., concurring). In the hypothetical of the silent opposition in *Crawford*, there was at least some opposition by the hypothetical plaintiff. Here, however, Thompson relies solely on his association. Under Thompson's analysis, no opposition or participation is required, and there is no requirement of a connection between the plaintiff's conduct and the employer's retaliation.

The term "retaliate" is not used in 42 U.S.C. § 2000e-3(a). This provision, however, is well known as the "anti-retaliation provision" of Title VII. The term "retaliate" has meaning. Webster's Dictionary defines "retaliate" to mean: "to repay (as an injury) in kind" and "to return like for like; especially: to get revenge." Webster's Dictionary (online http: //www. Merriam-webster.com/diction/retaliate) (last visited October 20, 2010). Under the express statutory language, the party engaging in the protected conduct is the party who is being protected from repayment by the employer "in kind" and "like for like" for the employer's injury. Clearly, a plaintiff alleging

only a third-party association is not the party against whom the retaliation is directed.[3]

In *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), this Court examined the meaning of the term "retaliate" as it related to allegations of discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, which prohibits discrimination by recipients of federal education funding. The Court's description of the right to be free from retaliation under Title IX emphasized the connection between the unlawful discrimination and the plaintiff's protected conduct as an element of the protected right: "Retaliation is, by definition, an intentional act. It is a form of 'discrimination' **because the complainant** is being subjected to different treatment." *Id.* at 173 (emphasis added). The Court determined that "retaliation" is an "intentional response to the nature of the complaint." *Id.* at 174. Thus, the context in which the term "retaliation" is used is that of the person who engaged in the protected conduct – not a third-party association.

If Congress had intended to grant protection to third-party associations under Title VII's anti-retaliation provision, it could have easily included associational language as it did in the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* The Americans with Disabilities Act specifically defines

3. Judge Rogers' concurring opinion below recognized that "[t]he intended beneficiaries of the anti-retaliation provision of §2000e-3(a) are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation." Pet. App. 32a.

"discrimination" to include "excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). Likewise, the regulations promulgated under the ADA provide that "[i]t is unlawful for a covered entity to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of a known disability of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association." 29 C.F.R. § 1630.8. This associational protection is not contained in Title VII.

The text of the anti-retaliation provision does not reach as far as Thompson and the United States desire. The question before the Court is whether the anti-retaliation provision provides a cause of action for third-party associations of protected parties, not whether providing that right makes good policy. The answer is that the plain language of the anti-retaliation provision does not so provide.

III. THE RIGHT OF REGALADO TO PURSUE A RETALIATION CLAIM UNDERMINES THOMPSON'S CONCERN OF AN EMPLOYER USING FAMILY MEMBERS TO EFFECTUATE RETALIATION.

Thompson devotes a substantial portion of his brief explaining the sound policy of Title VII's anti-retaliation provision and the importance of ensuring that employers are not permitted "to retaliate against a man by hurting a member of his family [which] is an ancient method of

revenge, and is not unknown in the field of labor relations." Pet. Br. 17. Thompson's concern that employers will be given a license to retaliate against employees if third-party association claims are not permitted is wholly undermined by the failure of Regalado – the alleged intended target - to pursue a claim for retaliation against North American Stainless. Regalado was capable of pursuing her own claim for retaliation, but did not do so. Regalado obviously knew how to avail herself of the protections of the EEOC. She filed two charges of discrimination against North American Stainless – one before and one after Thompson's discharge. Resp. App., Regalado depo. 44, 45, 48, 49, 60. Notably, both charges were dismissed by the EEOC, and the EEOC never initiated proceedings against North American Stainless on her behalf. *Id.*

The summary judgment granted by the district court left completely intact the rights of employees who engage in protected conduct to pursue retaliation claims. Neither the district court nor the court of appeals expressed any opinion on whether retaliating against a protected party by injuring the protected party's "close association" was lawful. The decision of the district court was limited to whether the close association could pursue a claim for that retaliation. Thus, the arguments by Thompson and his amici that employees will be fearful of coming forward to complain of Title VII violations occurring in the workplace for fear of retaliation by the employer are unfounded. The prohibition of employer retaliation against an employee because the employee engages in protected conduct remains intact and unaffected by the summary judgment.

IV. THE MAJORITY OF LOWER COURTS ADDRESSING THIS ISSUE HAVE REFUSED TO RECOGNIZE THIRD-PARTY RETALIATION CLAIMS AS VALID CAUSES OF ACTION UNDER FEDERAL ANTI-RETALIATION LAWS.

The Sixth Circuit Court of Appeals is not the only court to refuse to recognize the right of a third-party to bring a cause of action for retaliation based upon the protected conduct of another employee. The Third, Eighth and Fifth Circuits are in agreement with the Sixth Circuit. In *Smith v. Riceland Foods*, 151 F.3d 813 (8th Cir. 1998), the court of appeals refused to recognize a right for an employee to bring a Title VII retaliation claim where the plaintiff/employee alleged that he was discharged due to his girlfriend's statutorily protected activity. The court held that bringing a third-party retaliation claim when the plaintiff did not engage in any statutorily protected activity "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others from retaliation." *Id.* at 819. The court further held that "Title VII already offers broad protection to such individuals by prohibiting employers from retaliating against employees for 'assist[ing] or participat[ing] in any manner' in a proceeding under Title VII." *Id.*

In *Fogleman v. Mercy Hospital*, 283 F.3d 561 (3rd Cir. 2002), the court rejected an employee's attempt to bring a third-party retaliation claim under the Age Discrimination in Employment Act's anti-retaliation provision, 29 U.S.C. § 623(d), based upon an allegation that the plaintiff employee was discharged because his

father, who also worked for the defendant employer, filed an age discrimination claim against the employer. The court relied upon the language of the ADEA's retaliation provision, which the court recognized is almost identical to Title VII's anti-retaliation provision, as the basis for its decision.[4] *Id.* at 568. Part of the court's concern in allowing parties who had not engaged in protected conduct to pursue third-party retaliation claims was the potential for abuse of the protection by employees. The court held that "Congress may have also feared that expanding the class of potential anti-discrimination plaintiffs beyond those who have engaged in protected activity to include anyone whose friends or relatives have engaged in protected activity would open the door to frivolous lawsuits and interfere with an employer's prerogative to fire at-will employees." *Id.* at 570.

In *Holt v. JTM Industries, Inc.*, 89 F.3d 1224 (5th Cir. 1996), the plaintiff was placed on administrative leave from his job by the defendant employer two weeks after the employer received notice that the plaintiff's wife, also an employee of the defendant, had filed a charge of age discrimination with the EEOC. The plaintiff alleged that he was discharged in retaliation for his wife having filed the age discrimination charge. Like Thompson, the plaintiff admitted that he did not

4. The ADEA's retaliation provision provides:

> It shall be unlawful for an employer to discriminate against any of his employees ... because such individual ... has opposed any practice made unlawful by this section, or because such individual ... has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or litigation under this chapter.

29 U.S.C. § 623(d).

engage in any protected activity. The Fifth Circuit rejected the plaintiff's attempt to broaden the protection of the ADEA's anti-retaliation provision to persons based solely upon their association with an employee who has engaged in protected activity. The court held that "such a rule would contradict the plain language of the statute and will rarely be necessary to protect employee spouses from retaliation." *Id.* at 1226. The court also recognized the practical difficulties that would arise from granting protection based upon an association:

> [W]e believe that the language that Congress has employed in § 623(d) will better protect employees against retaliation than we could by trying to define the types of relationships that should render automatic standing under § 623(d). If we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation?

Id. at 1227. The court recognized that "[t]he anti-retaliation provisions of the ADEA and Title VII are similar and 'cases interpreting the latter provision are frequently relied upon in interpreting the former.'" *Id.* at n. 1.

A significant number of district courts have also considered the issue of third-party retaliation claims and have refused to allow plaintiffs who have not engaged in protected conduct to pursue the claims. *See Parker v. AECOM USA, Inc.*, 2010 WL 625417 (D. Conn. 2010); *Rainer v. Refco, Inc.*, 464 F. Supp.2d 742 (S.D. Ohio

2006); *Singh v. Green Thumb Landscaping*, 390 F. Supp.2d 1129, 1136 (M.D. Fla. 2005); *Sukenic v. Maricopa County*, 2004 WL 3522690 (D. Ariz. 2004); *Higgins v. TJX Cos., Inc.*, 328 F. Supp.2d 122, 123 (D. Me. 2004); *U.S. EEOC v. Bojangles Rest. Inc.*, 284 F. Supp.2d 320, 327 (M.D.N.C. 2003); *Horizon Holdings, LLC v. Genmar Holdings, Inc.*, 241 F. Supp.2d 1123, 1143 (D. Kan. 2002); *Freeman v. Barnhart*, 2008 WL 744827 (N.D.Cal. 2008); *Dawn L. v. Greater Johnstown School District*, 586 F.Supp.2d 332 (W.D.Pa. 2008); *EEOC v. Wal-Mart Stores, Inc.*, 576 F.Supp.2d 1240 (D.N.M. 2008). State courts, likewise, have examined this issue regarding state equivalent Title VII statutes and agree that no cause of action exists. *See Dias v. Goodman Manufacturing Co.*, 214 S.W.3d 672 (Tex.App. 2007); *Pope v. Motel 6*, 114 P.3d 277 (Nev. 2005); *Gagliardi v. Ortho-Midwest, Inc.*, 733 N.W.2d 171 (Minn.App. 2007); *Shoecraft v. Univ. of Houston-Victoria*, 2006 WL 870432 (S.D.Tex. 2006) (interpreting Texas state law claims).

V. THERE WILL BE A SIGNIFICANT NEGATIVE IMPACT TO EMPLOYERS IF THIRD-PARTY ASSOCIATIONS ARE AFFORDED PROTECTION UNDER THE ANTI-RETALIATION STATUTE.

Retaliation claims are the fastest growing category of Title VII claims filed with the EEOC. From 1997 to 2009, the number of Title VII retaliation claims filed annually increased by over ten percent. Title VII retaliation claims represent the second highest category of claims filed, second only to race discrimination claims. U.S. Equal Employment Opportunity Commission, Charge Statistics FY 1997 through FY 2009 (statistics available at http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm) (last visited October 21, 2010).

See also Crawford, 129 U.S. at 855 (Alito, J., concurring) ("The number of retaliation claims filed with the EEOC has proliferated in recent years. . . . [R]etaliation charges filed with the EEOC doubled between 1992 and 2007[.] An expansive interpretation of protected opposition conduct would likely cause this trend to accelerate.")

Under Thompson's proposal to expand the anti-retaliation provision to include third person association claims, an employee who claims a close association with a protected party will be entitled to automatic job protection. Thompson does not define the scope of the relationships entitled to protection nor does he offer guidance on a standard to be applied. Employers and courts will be left guessing at what relationships are entitled to protection. Employers will not know whether employees are protected and, hence, whether at-will employment decisions may be taken against the employee. Likewise, courts will be left to decide on a case-by-case basis whether the relationship between the plaintiff and the protected party rises to the level warranting protection. This will lead to mini-trials on whether the protection should be recognized.

Remarkably, Thompson relies upon the status of his relationship with Regalado **at the time the complaint was filed** (i.e., married) rather than when the alleged retaliation occurred (i.e., engaged) in support of his third-party standing argument. Pet. Br. 41-42 ("[T]here undeniably was a 'close relationship' between Thompson and his then fiancée Regalado; by the time this lawsuit was filed, Thompson and Regalado were married. The relationship of husband and wife is certainly closer than the relationships this Court has previously held sufficient to satisfy this element."). Conducting a post-

retaliation examination of the relationship status would obviously create a huge potential for abuse and provide no notice to employers of an employee's protected status. While it is unlikely that employees would marry in order to establish third-party standing to support a retaliation claim, it is certainly foreseeable that a party could create a relationship in an effort to present an ostensible prima facie claim of retaliation.

The increased scope of this protection places a significant burden upon employers in taking necessary disciplinary action. It is a reality in the workplace that the first question considered by many employers before deciding whether to take necessary disciplinary action is whether the employee is in a protected category. If the employee is protected, the employer who does not have the appropriate paperwork in place or has not undertaken progressive discipline will likely delay or forego the necessary discipline based upon the legal risk associated with the discipline, despite the merits of the discipline.

If third-party retaliation claims based upon close associations are permitted to proceed, the legal risk associated with necessary discipline will increase exponentially. The employer's ability, as a practical matter, to take the necessary discipline is going to be severely diminished. Moreover, employers who are contemplating disciplinary measures against an employee are going to be placed in the position of inquiring into the nature of an employee's relationships in order to determine the risk of imposing legitimate disciplinary measures. Or, more significantly, employers may be placed in the position of defending a

discrimination or retaliation claim even though the employee was not in a protected class at the time discipline was imposed.

Additionally, given the automatic protection that will arise by claiming an association with a protected party, there is a real risk of employees falsely claiming a close association to limit the risk of discipline. As set forth above, the Third, Fifth and Eighth Circuits recognized some of these practical difficulties that will arise from affording protection to close associations.

Thompson offers no insight as to what standards will guide courts in determining whether the relationship between the employee plaintiff and the protected party is worthy of protection. That uncertainty creates a significant burden upon employers. Retaliation cases will be infused with mini-trials where the sufficiency of the relationship between the plaintiff and the protected party will have to be determined. Additionally, these mini-trials will very likely lead to factual questions and substantially eliminate the possibility of summary judgment in these cases. *See Crawford*, 129 S.Ct. at 854 (Alito, J., concurring).[5] It is entirely reasonable to

5. Justice Alito stated in his concurring opinion that "[a]n interpretation of the opposition clause that protects conduct that is not active and purposive would have important practical implications. It would open the door to retaliation claims by employees who never expressed a word of opposition to their employers. To be sure, in many cases, such employees would not be able to show that management was aware of their opposition and thus would not be able to show that their opposition caused the adverse actions at all. But in other cases, such employees might well be able to create a genuine factual issue on the question of causation." *Crawford*, 129 S.Ct. at 854 (Alito, J., concurring).

believe that Congress was cognizant of these practical implications when it did not define aggrieved persons to include "any person injured."

VI. THE ISSUE OF WHETHER THOMPSON MAY PROCEED UNDER TITLE VII'S ENFORCEMENT PROVISION AS A "PERSON AGGRIEVED" IS NOT PROPERLY BEFORE THIS COURT.

The issue before the district court and the court of appeals was whether the scope of the anti-retaliation provision, 42 U.S.C. § 2000e-3(a), should be broadened to allow "friends and family" to file retaliation claims even though the plaintiff's "friends and family" did not engage in protected conduct. Pet. App. 2a. Thompson never argued in the courts below that he should be permitted to pursue his claim as a "person aggrieved" under Title VII's enforcement provision, 42 U.S.C. § 2000e-5.[6] The issue was raised for the first time during the Sixth Circuit *en banc* oral arguments by the court, not Thompson.

The decision by the *en banc* majority does not mention the enforcement provision. The majority only considered the issue of "whether §704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2003-3(a),

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6. Courts have widely recognized the distinction between the issue of whether a party has standing and whether a party has a cause of action. *See e.g., In re Olympia Holding Corp.*, 88 F.3d 952, 959 n.12 (11th Cir. 1996); *Mulhall v. Unite Here Local 355*, 618 F.3d 1279, 1286 (11th Cir. 2010); *The Wilderness Society v. Kane County, Utah*, 581 F.3d 1198, 1215-1216 (10th Cir. 2009); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 n. 4 (9th Cir. 2002).

creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity." Pet. App. 2a. The enforcement provision is discussed by Judge Rogers in his concurring opinion. He concludes that Thompson is not a "person aggrieved" by the alleged retaliation because "[t]he intended beneficiaries of the anti-retaliation provision are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation." Pet. App. 32a. The issue is not discussed in the dissenting opinion of Judge Martin. Pet. App. 33a-38a. The issue was discussed as a response to Judge Rogers' concurrence in the dissent of Judges Moore and White. Pet. App. 50a-53a and 58a-63a.

Because the issue was not raised until the *en banc* oral arguments, and not by Thompson, North American Stainless never had the opportunity to brief this issue for the district court or the court of appeals. In its brief in opposition to certiorari, North American Stainless specifically objected to the inclusion of this issue by Thompson and continues to object herein. *See* Brief in Opposition 26-27.

This Court has demonstrated on numerous occasions its refusal to hear arguments made for the first time before it unless there are exceptional circumstances warranting this approach.[7] As this Court

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7. *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 168-169, 125 S.Ct. 577, 585 (2004) ('We ordinarily do not decide in the first instance issues not decided below."); *TRW Inc. v. Andrews*, 54 U.S. 19, 35, 122 S.Ct. 441, 451 (2001) ("We do not reach this issue because it was not raised or briefed below"); *Clingman v. Beaver*, 544 U.S. 581, 598 125 S.Ct. 2029, 2041-2042 (Cont'd)

recognized in *Federal Communications Commission v. Fox Television Stations, Inc.*, 129 S.Ct. 1800, 1819 (2009), it "is [a court] of final review, not of first review . . . ." (Internal citations omitted). Even though a few of the court of appeals judges considered the issue, it was clearly not addressed by the majority nor by North American Stainless. Moreoever, Thompson has not argued that any exceptional circumstances exist which require the Court to hear the issue for the first time.

(Cont'd)

(2005) ("We ordinarily do not consider claims neither raised nor decided below, and respondents have pointed to no unusual circumstances that would warrant considering other portions of Oklahoma's electoral code this late in the day") (internal citations omitted); *Gonzales v. Duenas Alvarez*, 549 U.S. 183, 194 (2007) ("Regardless, the lower court did not consider the claims, and we decline to reach them in the first instance"); *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.*, 549 U.S. 443 (2007) ("In any event, we ordinarily do not consider claims that were neither raised nor addressed below . . . ."); *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U.S. 317, 330 (1967) ("Under these circumstances, we see no cause for deviating from our normal policy of not considering issues which have not been presented to the Court of Appeals and which are not properly presented for review here."); *Christian Legal Society Chapter of the University of California v. Martinez*, 130 S.Ct. 2971, 2995 (2010) ("[T]his Court is not the proper forum to air the issue in the first instance."); *City of Springfield, Massachusetts v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."); *U.S. v. Alvarez-Sanchez*, 511 U.S. 350, 360, n. 5 (1994) ("Finding no exceptional circumstances that would warrant reviewing a claim that was waived below, we adhere to our general practice and decline to address respondent's Fourth Amendment argument.").

VII. TITLE VII'S ENFORCEMENT PROVISION DOES NOT PROVIDE THOMPSON THE RIGHT TO PURSUE A RETALIATION CLAIM WITHOUT HAVING ENGAGED IN ANY PROTECTED CONDUCT.

Even if the issue of Thompson's ability to pursue his third-party retaliation claim under Title VII's enforcement provision, 42 U.S.C. § 2000e-5(f)(1), were properly before this Court, Thompson's argument is without merit. Title VII's enforcement provision does not afford the right to pursue a retaliation claim to "any person injured" by a violation of the anti-retaliation provision. The language used by Congress is more restrictive. The enforcement provision provides a private right of enforcement to "the person claiming to be aggrieved." 42 U.S.C. § 2000e-5f(1).

The statutory scheme of Title VII's enforcement provision is contained in 42 U.S.C. § 2000e-5. Subsection (f)(1) of the enforcement provision sets forth the procedure for a private party to pursue a cause of action under Title VII. A civil action against a non-governmental party may be initiated by the Commission. In an action filed by the Commission, "[t]he person or persons aggrieved shall have the right to intervene in the civil action brought by the Commission." The Commission is required to "notify the person aggrieved" if the Commission (1) dismisses the charge of discrimination, (2) has not filed a civil action within 180 days, or (3) has not facilitated a conciliation agreement. This notification provides a 90-day period in which "a civil action may be brought against the respondent named in the charge (A) by **the person claiming to be**

aggrieved or (B) if such charge was filed by the Commission, **by any person whom the charge alleges was aggrieved** by the alleged unlawful employment practice." 42 U.S.C. § 2000e-5(f)(1) (emphasis added).

A. The term "aggrieved" is not a substitute for the term "injured."

Congress chose to use the phrase "person claiming to be aggrieved" rather than the phrase "any person injured" in the enforcement section. The term "aggrieved" is not defined in Title VII, and Thompson cites no authority to equate the terms "aggrieved" and "injured." This Court has clearly recognized the distinction between the terms "aggrieved" and "injured" and has explained the significance of the term "aggrieved" in statutory construction.

In *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), the Court provided the following illustration to demonstrate the distinction between these words:

> [W]e have said that to be "adversely affected or aggrieved ... within the meaning" of a statute, the plaintiff must establish that the injury he complains of (*his* aggrievement, or the adverse effect *upon him*) falls within the "zone of interests" sought to be protected by the statutory provision whose violation forms the legal basis for his complaint. *See Clarke v. Securities Industry Assn.*, 479 U.S. 388, 396-397 (1987). Thus, for example, the failure of an agency to comply with a statutory provision requiring "on the record" hearings would

> assuredly have an adverse effect upon the company that has the contract to record and transcribe the agency's proceedings; but since the provision was obviously enacted to protect the interests of the parties to the proceedings and not those of the reporters, that company would not be "adversely affected within the meaning" of the statute.

Id. at 883. Thompson's position in this case is similar to the recording company's position in the above illustration. The recording company lost business as a result of the recording violation; Thompson alleges that he lost his job as a result of a violation of the anti-retaliation provision (i.e., the retaliation against Regalado.) While Thompson may have been injured by the alleged statutory violation, just as the recording company was injured, Thompson is not "aggrieved" within the meaning of the anti-retaliation provision. He is not aggrieved within the meaning of the statute because he is not the intended beneficiary of Title VII's anti-retaliation protections. He is not the intended beneficiary because he did not engage in any protected conduct. *See Burlington*, 548 U.S. at 63 (holding that "the anti-retaliation provision seeks to prevent harm to individuals based upon what they do, i.e., their conduct"). Accordingly, even if Thompson's allegation that his discharge was an "indirect retaliation" against Regalado due to her protected conduct, and even if this action violates Title VII's anti-retaliation provision, Thompson was not "adversely affected or aggrieved ... within the meaning" of the anti-retaliation provision. That is, he has not shown that "*his* aggrievement, or the adverse effect *upon him*, falls within the 'zone of

interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint" as required. *See Lujan*, 497 U.S. at 883.

B. The term "aggrieved," as used by Congress, is a term of art.

The term "aggrieved" contained in Title VII's enforcement provision is not an uncommon statutory term. This Court explained in *Director, Office of Workers' Compensation Programs, Dept. of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126 (1995), that this term has been used by Congress to mean those persons who could satisfy both prudential and constitutional standing limitations:

> The phrase "person adversely affected or aggrieved" is a term of art used in many statutes to designate those who have standing to challenge or appeal any agency decision, within the agency or before the courts. . . . We have thus interpreted § 702 [the judicial review provision of the APA] as requiring a litigant to show, at the outset of this case, that he is injured in fact by agency action and that the interest he seeks to vindicate is arguably within the "zone of interests to be protected or regulated by the statute."

Id. at 127. Thus, "Congress [] was not writing on a clean slate when it authorized 'aggrieved persons' to bring Title VII actions." *Childress v. City of Richmond Virginia*, 134 F.3d 1205, 1208 (4th Cir. 1998) (Luttig, J. concurring). Judge Luttig in *Childress* further explained that:

> because Congress used the term of art 'aggrieved person' in Title VII, and chose not to define that term for purposes of that statute; because the background understanding of "aggrieved person" includes prudential limits on standing; and because one of the primary prudential limitations is that a plaintiff cannot enforce the rights and interests of another," the term "person aggrieved" in Title VII should be interpreted "so as to incorporate the prudential rule against third-party standing.

Id. Thompson has not cited any authority that would require the Court to broaden the construction of the phrase "aggrieved person" under Title VII to mean "any injured person."

C. Congress could have provided the right of enforcement to "any person injured" or defined "the person aggrieved" to mean any person injured.

If Congress intended Title VII to be enforced by any person conceivably injured as a result of statutory violation, it could have written the enforcement scheme to provide a right of action "to any injured person." Likewise, it could have defined the term "aggrieved person" to include "any injured person" if it intended to broaden the term beyond the ordinary meaning. There are statutes in which Congress has included a definition of the term "aggrieved person" when Congress intended to provide a cause of action to all injured persons. For example, the enforcement provision

for private persons in the Fair Housing Act, 42 U.S.C. § 3613, states that "an aggrieved person may commence a civil action . . ." The phrase "aggrieved person" is defined in the Act as follows:

> "Aggrieved person" includes any person who – (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

42 U.S.C. § 3602(i)(1)-(2).

If Congress understood the phrase "person aggrieved" to have a meaning of "any person injured," then the broader definition set forth in the Fair Housing Act would not have been necessary. Clearly that is not the case, however. Congress has chosen to broaden the scope of the Fair Housing Act beyond the ordinary meaning of "person aggrieved" to include "any person who claims to have been injured."

VIII. THOMPSON LACKS STANDING TO PURSUE A CLAIM FOR VIOLATION OF THE ANTI-RETALIATION PROVISION.

Thompson has not cited any precedent which would require this Court to ignore prudential standing principles when considering whether third-party retaliation claims should be permitted under Title VII. Prudential standing jurisprudence embodies "judicially self-imposed limits on the exercise of federal jurisdiction." *Elk Grove Unified School District v.*

Newdow, 542 U.S. 1, 11-12 (2004). It also encompasses "the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interest protected by the law invoked." *Id.* at 12. *See also Warth v. Seldin*, 422 U.S. 490, 499 (1975) (holding that "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties"). Prudential standing limitations are consistent with Title VII's enforcement scheme which limits the person who may bring a claim to "the person claiming to be aggrieved" and not to "any person claiming to be injured" by violation of the statute.

This Court explained in *Warth* that "the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art. III's minimum requirements, serve to limit the role of the courts in resolving public disputes." *Id.* at 500. The Court explained that "[e]ssentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood **as granting persons in the plaintiff's position** a right to judicial relief." *Id.* (emphasis added). Here, the source of Thompson's claim to relief is Title VII's anti-retaliation provision. As set forth above, the anti-retaliation provision protects parties who engage in protected conduct, not those associated with that person. *Burlington*, 548 U.S. at 63. Thus, Title VII's anti-retaliation provision cannot be understood to grant Thompson a right to judicial relief.

A. Thompson's reliance upon *Trafficante* and *Blue Shield* is misplaced.

Thompson and the United States cite two cases interpreting statutes other than Title VII which use the term "aggrieved" in support of the argument that Thompson should be entitled to pursue a claim for his injuries under the anti-retaliation provision. In *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), the plaintiff alleged violation of his right under the Fair Housing Act to live in housing which was free from discriminatory housing practices. In *Blue Shield of Va. v. McCready*, 457 U.S. 465 (1982), the plaintiff alleged violation of her right under the Sherman Act to be protected from a failure of market due to an unlawful restraint of trade. She sought damages under the Clayton Act for the alleged violations.

Thompson's reliance upon these two cases is misplaced. The plaintiffs in these cases were asserting statutory violations of **their own** rights, not a third-party's rights. This Court has cautioned that "[w]hen conducting statutory interpretations, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.'" *Gross v. FBL Financial Services, Inc.*, 129 S.Ct. 2343, 2349 (2009) (quoting *Federal Express Corp. v. Holowecki*, 552 U.S. 389 (2008)). The facts of *Trafficante* and *Blue Shield* are distinguishable from the facts in this case because Thompson is not asserting a violation of his right under the anti-retaliation statute. Furthermore, the language in Title VIII and the Clayton Act differ from the language used in Title VII.

1. Trafficante.

In *Trafficante*, two tenants of an apartment complex, one white and one African American, filed complaints under Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act) against the owners of their apartment complex for intentionally discriminating against non-whites in the renting of units in the apartment complex. The plaintiff tenants were not denied housing based upon their race. Each of the plaintiffs argued, nonetheless, that they had been injured by the discriminatory housing practices of the defendants because they had (1) lost the social benefits of living in an integrated community; (2) missed business and professional advantages which would have accrued if they had lived with members of minority groups, and (3) suffered embarrassment and economic damage from being stigmatized as residents of a white ghetto. *Id.* at 207-08.

As in this case, the district court did not reach the merits of the claim as to whether discrimination had occurred. The district court dismissed the plaintiffs' claims on the basis that the plaintiffs were not within the class of persons entitled to sue. The district court found that they had not been denied application for housing based upon their race and, therefore, could not pursue a cause of action under Title VIII. The Third Circuit Court of Appeals agreed. This Court reversed.

This Court determined that the plaintiff tenants alleged the "loss of important benefits from interracial associations," and that they were entitled to receipt of those benefits under Title VIII. *Id.* at 209-10. The Court

determined that Title VIII's definition of "person aggrieved" as "**any person** who claims to have **been injured** by a discriminatory housing practice" to evidence "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id* at 209. (emphasis added).

The distinction between the facts in *Trafficante* and in this case is significant. The plaintiffs in *Trafficante* argued that **they** had a right under Title VIII to live in integrated housing and that **their right** to live in integrated housing had been violated by the defendant. That is, they argued that they were "aggrieved" within the meaning of Title VIII. In stark contrast, Thompson does not claim to be "aggrieved" within the meaning of Title VII's anti-retaliation provision. Thompson has a right under Title VII's anti-retaliation provision to "oppose" or "participate" in protected activity and to be protected from retaliation by his employer if he does so. Thompson, however, did not undertake any "opposition" or "participation" activities which are protected by the anti-retaliation provision. Thompson does not allege that North American Stainless retaliated against him. He alleges retaliation against his close association. Thompson does not allege to have been denied the right afforded to him by the anti-retaliation provision. There is a significant distinction between Thompson's allegations in this case and the plaintiffs' allegations in *Trafficante*.

In Judge Rogers' concurring opinion in the Sixth Circuit below, he recognized that *Trafficante* does not reach as far as Thompson now contends. Judge Rogers wrote that *Trafficante* could not "properly be read to

say that any person affected by the imposition of retaliation should be deemed sufficiently aggrieved to bring a Title VII claim." Pet. App. 31a., n. 1. Judge Rogers explained that "[w]hile Title VII can be interpreted to protect the right of people to associate with people of different races, it can hardly be interpreted to protect the right of people to associate with people who have been retaliated against." Pet. App. 31a, n. 1.

Not only are the facts in *Trafficante* distinguishable, but there also are substantial material differences between the statutory language in Title VII and Title VIII. In 1972, when *Trafficante* was decided, the Fair Housing Act's enforcement provision provided the right to pursue a claim by "the person aggrieved." That term was specifically defined in the statute to mean "[a]ny person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur."[8] Title VII does not contain the expansive definition of "person claiming to be aggrieved" that the Fair Housing Act contains. This

8. The language from the Fair Housing Act set forth in this section is the language as the statute existed in 1972 at the time *Trafficante* was decided. See 3610, Pub.L. No. 90-284, Title VIII, § 810, Apr. 11, 1968, 82 Stat. 85. Section 810 of Title VIII was repealed in 1988 by Pub.L. No.100-430, § 8(2), Sept. 13, 1988, 102 Stat. 1625. Public Law 100-430 added a definition section defining "person aggrieved" to include "any person who (1) claims to have been injured by a discriminatory housing practice; or (2) believes that such person will be injured by a discriminatory housing practice that is about to occur." Pub.L. No. 100-430, § 5, 102 Stat. 1619, which is codified at 42 U.S.C § 3602(i).

Court in *Trafficante* specifically noted that the statutory definition of "person aggrieved" given by Congress in the Fair Housing Act was "broad and inclusive." *Trafficante*, 409 U.S. at 209. The Court found that the broad statutory definition was also necessary because HUD had no power of enforcement under the statute. *Id.* at 210. The Attorney General's authority to bring suit under the statute was limited to correcting "a pattern or practice" violating the Act. *Id.* at 211. Thompson cannot point to any similar definition in Title VII that would allow him to enforce the provision as broadly as he seeks.

Given the factual distinctions, the difference in statutory language between Title VII and the Fair Housing Act, and the difference in the enforcement mechanisms, reliance upon *Trafficante* as a basis to allow third-party association claims to be pursued by a "person injured" by the alleged retaliation is misplaced.

2. Blue Shield.

In *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), the plaintiff alleged that her group health plan engaged in an unlawful conspiracy with a group of psychiatrists to restrain competition of psychotherapy services. The plaintiff was a consumer of psychotherapy services and, thus, claimed to have been injured by the refusal to provide reimbursement for services provided to her by her psychologist. The plaintiff alleged the conspiracy violated § 1 of the Sherman Act, 15 U.S.C. § 1. She sought treble damages and attorney's fees under § 4 of the Clayton Act. The district court dismissed her claim on the basis that she had no standing under the

Clayton Act. The Court of Appeals reversed, and this Court affirmed.

The purpose of the Sherman Act is "to protect the public from failure of the market." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458 (1993). McCready alleged that the Act was violated by the conspiracy to restrict trade engaged in by Blue Shield and the defendant psychiatrists. She asserted that **she had been injured by violation of the right afforded to her under the Sherman Act**. She was not, like Thompson in this case, asserting that she had been injured by the violation of some third-party's rights. The facts in *Blue Shield* are not sufficiently similar to have any precedential value in this case.

Further, the language of Section 4 of the Clayton Act is considerably different than the language of Title VII's enforcement provision as well. The Clayton Act contains broad remedial language which provides treble-damages to "**[a]ny person who shall be injured** in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15 (emphasis added). Title VII's enforcement provision does not contain this broad language. Title VII violations may be enforced by "the person claiming to be aggrieved" by the alleged unlawful employment practice. Given the factual distinctions in *Blue Shield* and the significantly broader language the Clayton Act's enforcement provision, reliance upon *Blue Shield* as a basis to allow Thompson to proceed with a claim under Title VII based upon his association with Regalado is misplaced.

IX. THIRD-PARTY ASSOCIATION RETALIATION CLAIMS ARE NOT CONSISTENT WITH THE *MCDONNELL DOUGLAS* FRAMEWORK.

Thompson has not offered any framework by which third-party retaliation claims would be established at trial and for summary judgment purposes. Clearly, the *McDonnell Douglas* framework could not be followed or would have to be modified because the plaintiff will not be able to establish the first element of the prima facie case that he or she engaged in protected conduct. The burden of persuasion and order for the presentation of proof in a Title VII disparate treatment cases was set forth by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973). Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination. Establishing a prima facie case creates a presumption that the employer unlawfully discriminated against the employee. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, then the presumption of intentional discrimination disappears. The plaintiff may rebut the presumption by demonstrating that the employer's proffered reason is pretextual. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

This Court has never decided the issue of whether the *McDonnell Douglas* framework is applicable in Title VII retaliation cases. Title VII's anti-retaliation provision prohibits "discrimination," and the Court determined in *Jackson* that retaliation was discrimination. Thus, there is no reason to anticipate that a different framework would be applied in a

retaliation claim. Every circuit court of appeals has applied the burden shifting analysis in retaliation cases.[9]

Under the *McDonnell Douglas* scheme, in order to satisfy the minimal requirements of a prima facie case, the plaintiff must prove (1) that he was a member of the protected class, (2) that he was qualified for the position, (3) that, despite his qualifications he was rejected, and (4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainants qualifications. *McDonnell Douglas*, 411 U.S. 802. In the context of a retaliation claim, the plaintiff demonstrates membership in a protected class by showing that she participated in protected activity. Under Thompson's proposal, the plaintiff would no longer be required to demonstrate that she was a protected party or engaged in protected activity.

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9. The *McDonnell Douglas* burden shifting analysis to Title VII retaliation claims was applied in the following cases: *Fennell v. First Step Designs, Ltd.*, 83F.3d 526, 535 (1st Cir. 1996), *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 769 (2nd Cir. 1998), *Moore v. City of Philadelphia*, 461 F.3d 331, 341 (3d Cir. 2006), *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994), *Baker v. American Airlines, Inc.*, 430 F.3d 750, 754 (5th Cir. 2005), *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 543 (6th Cir. 1993), *Haywood v. Lucent Technologies, Inc.*, 323 F.3d 524, 531 (7th Cir. 2003), *Eliserio v. United Steelworkers of America*, 398 F.3d 1071, 1079 – 80 (8th Cir. 2005), *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000), *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004), *Gregory v. Georgia Dept. of Human Resources*, 355 F.3d 1277, 1279 (11th Cir. 2004), *Morgan v. Federal Home Loan Mortgage Company*, 328 F.3d 647, 651 (D. D.C. 2003), *Haddon v. Executive Residence at White House*, 313 F.3d 1352, 1359 (Fed. Cir. 2002).

Presumably, although Thompson has not offered this guidance, the plaintiff would be required to demonstrate as part of his proof that a close relationship existed between the plaintiff and the party who engaged in protected conduct. The plaintiff would also be required to establish that the adverse action taken against the plaintiff was intended to invoke retribution against the party who engaged in the protected conduct.

X. THE ISSUE OF WHETHER NORTH AMERICAN STAINLESS' ACTIONS VIOLATED REGALADO'S RIGHTS UNDER *BURLINGTON* IS NOT AT ISSUE IN THIS CASE AND NEED NOT BE DECIDED.

From the outset of this case, North American Stainless has denied the allegation that Thompson's discharge was motivated by an intent to retaliate against Regalado. North American Stainless continues to maintain that position. The question presented to the district court and the Sixth Circuit Court of Appeals presumed for purposes of ruling on the purely legal question in this case that the discharge was motivated by unlawful retaliation.[10] The legal issue presented in the lower courts was whether Thompson may pursue a claim for retaliation under 42 U.S.C. § 2000e-3 when he did not engage in any protected conduct. The unlawful retaliation was presumed for purposes of the summary judgment motion.

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10. Thompson stated at page 6 of his Brief to the Sixth Circuit in the statements of facts: "Thompson was terminated in retaliation for his fiancée's protected activity." [cite to p. 6]

North American Stainless argued to the district court that summary judgment was proper even if the discharge was motivated by retaliation because Thompson did not have a cause of action to pursue under the anti-retaliation provision. Record 12-2. Thompson's response in the district court also presumed retaliatory motive. Record 15-2. Thomspon argued that he was entitled to protection due to his close association with Regalado. In the court of appeals, Thompson argued that the anti-retaliation provision should be construed to include claimants who are "closely related [to] or associated [with]" a person who has engaged in protected conduct. Pet. App. 8a. Writing for the majority of the *en banc* court, Judge Griffin wrote "[t]he sole issue raised in this rehearing *en banc* is whether § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) creates a cause of action for third-party retaliation for persons who have not personally engaged in protected activity." Pet. App. 2a.

Thompson and the United States now ask this Court to resolve the question of whether Thompson's discharge meets the criterion of being materially adverse under 42 U.S.C. § 2000e-3 based upon the standard set forth in *Burlington*. As set forth above, this issue has been presumed for purposes of resolving whether Thompson could pursue a cause of action for retaliation. Because the *Burlington* issue was never resolved in the courts below and is not necessary to the outcome of this case, the issue should not be resolved for the first time at this level of final appellate review.

Even if the Court were to resolve the *Burlington* issue, the determination of whether Thompson's discharge was retaliatory must be viewed from "the

perspective of a reasonable person" in Regalado's position. *Burlington*, 126 S.Ct. at 2416. Regalado, however, is not a party to this case, and this question was never answered below. Furthermore, North American Stainless should be entitled to present the legitimate non-discriminatory reasons to its employment decision as a defense to Thompson's allegation of retaliatory motive. *Burlington* was decided two days after the district court originally granted summary judgment to North American Stainless. Thompson filed a motion to alter or amend the summary judgment with the district court citing *Burlington*, but the district court overruled the motion. The district court held:

> The *Burlington Northern* decision did not address the issue currently before this Court which is whether Title VII permits a retaliation claim by a plaintiff who did not himself engage in protected activity. Accordingly, the Court will not alter its June 20, 2006 Opinion and Order in light of the Supreme Court's decision in *Burlington Northern*.

Record 31, Order p. 3. It is not appropriate to address this issue now for the first time.

XI. THE EEOC COMPLIANCE MANUAL IS NOT ENTITLED TO DEFERENCE.

Thompson argues that this Court should look to the EEOC's Compliance Manual for "guidance" on whether Thompson may pursue a claim for retaliation. Pet. Br. 23. Reliance upon the EEOC's Compliance Manual is not warranted. The general rule regarding statutory

interpretations by administrative agencies was announced by this Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164 (1944). Thompson does not allege that the substantial deference afforded to certain other administrative determinations under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837(1984), should be afforded to the EEOC Compliance Manual. Indeed, in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 112, n.6 (2002), this Court specifically recognized that EEOC interpretative guidelines, including those contained in the EEOC Compliance Manual, do not receive *Chevron* deference and are entitled only "to respect" under *Skidmore*.[11] Chief Justice Burger previously cautioned against a "wooden application" of EEOC Guidelines or "slavish adherence" to them in Title VII cases, as "they are not federal regulations which have been submitted to public comment and scrutiny . . . ."*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 452, (1975) (Burger, C.J., concurring in part and dissenting in part).

The courts that have evaluated the specific portions of the EEOC Compliance Manual relied upon by Thompson herein have explicitly rejected its interpretation of § 2000e-3(a). See *Singh v. Green Thumb Landscaping, Inc.*, 390 F.Supp.2d 1129, 1137 (M.D. Fla. 2005) ("The EEOC's interpretation of Title VII's anti-retaliation provision is not based on a thorough consideration of the issues presented to the Court."); *Ranier v. Refco, Inc.*, 464 F.Supp.2d 742, 750

11. *See also EEOC v. SunDance Rehabilitation Corp.*, 466 F.3d 490 (6th Cir. 2006); *Taylor v. Federal Express Corp.*, 429 F.3d 461 (4th Cir. 2005).

(S.D.Ohio 2006) (refusing to defer to the same part of the EEOC Compliance Manual and holding that "the [EEOC's Compliance] manual's interpretation is not entitled to significant deference because it does not appear to be well-reasoned and is not supported by a thorough consideration of the various legal decisions which have reached the opposite conclusion."). *See also Ebbert v. DaimlerChrysler Corp.*, 319 F.3d 103, 114 (3rd Cir. 2003) (holding that that the EEOC's statutory interpretations do not "contain reasoning or any hallmark of deliberation that could be persuasive to a court.")

As noted in *Singh*, the EEOC Compliance Manual references three cases as support for the position that claims by persons such as Thompson are cognizable under § 2000e-3(a): *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108 (W.D.N.Y. 1996); *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993); *Thurman v. Robertshaw Control Co.*, 869 F.Supp. 934 (N.D.Ga. 1994). Not only are these cases distinguishable from the instant matter, but the EEOC's view is contrary to the holdings of the circuits which have addressed the specific issue before this Court.

In *Murphy*, the court repeatedly stated in its findings that the husband, who asserted the retaliation claim, had "assisted and supported" his wife in her complaints of discrimination. 946 F. Supp. at 1113, 1114, 1117. Here, Thompson never claimed to have assisted Regalado in this case. In *Ohio Edison*, the court specifically noted that the issue was one of "retaliation against an employee when he has asked another employee to act on his behalf in protesting allegedly

discriminatory practices." 7 F.3d at 543. Here, Thompson never alleged that he was acting on Regalado's behalf or serving as her representative, let alone that he protested any discriminatory practices. Finally, despite the EEOC's contention that *Thurman* supports the recognition of third-party retaliation claims, the court there ultimately granted summary judgment to the employer on those claims. 869 F.Supp. at 941.

The EEOC misplaces reliance on this authority. The Manual dismisses the holding of *Holt v. JTM Indus.*, 89 F.3d 1224 (5th Cir. 1996), in which the Fifth Circuit refused to recognize a third-party retaliation claim based solely on association. Yet, *Holt* is in accordance with all of the circuits that have addressed this issue, as discussed above. Not only have various courts refused to defer to the EEOC's statutory interpretations, but they have also repeatedly recognized that this role is better suited to the courts than the EEOC. *See e.g., Crumley v. Delaware State College*, 797 F.Supp. 341, 347 (D. Del. 1992) ("Because the EEOC's expertise does not encompass analysis of Supreme Court cases, this Court will not rest its holding on deference to the EEOC's Policy Statement.") In *Chevron*, this Court recognized that "[t]he judiciary is the final authority on issues of statutory construction . . . ." 467 U.S. at 843. The Third Circuit similarly acknowledged that "the interpretation of statutes is the prerogative of the courts" rather than the EEOC. *Ebbert*, 319 F.3d at 111 n. 8. The court further noted that:

> [T]he courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute,

> whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.

Id. (*quoting Federal Election Commission v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981)).[12] "Questions of law that can be answered with 'traditional tools of statutory construction' are within the special expertise of courts, not agencies . . . ." *Lee v. Sullivan*, 787 F.Supp. 921, 937 (N.D. Cal. 1992).

The fact that the EEOC has filed amicus briefs in various cases does not lend any greater credence to its position either. As the District of Columbia Circuit Court of Appeals has noted:

> The brief is obviously not the product either of formal adjudication or notice-and-comment rule-making, and accordingly has no more status than the opinion letters, policy statements, agency manuals, and enforcement guidelines that the Court said were undeserving of such deference in *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000).

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12. *See also Ferroni v. Teamsters, Chauffeurs & Warehousemen Local No. 222*, 297 F.3d 1146, 1151 (2nd Cir. 2002) (rejecting an EEOC interpretation that was "directly contrary to the statute's plain language"); *Leonard F. v. Israel Discount Bank of New York*, 199 F.3d 99, 106 (2nd Cir. 1999)(no deference is required when the agency's interpretation is at odds with the statute).

Fogg v. Ashcroft, 254 F.3d 103, 109 (D. D.C. 2001). *See also In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 943 (8th Cir. 2007). The Tenth Circuit similarly recognized in *Shikles v. United Mgmt. Co.*, 426 F.3d 1304, 1315 (10th Cir. 2005), that "amicus briefs, opinion letters, and policy guidances do not reflect the deliberate exercise of interpretive authority that regulations and guidelines demonstrate." Clearly, the EEOC's statutory interpretation has not enjoyed widespread acceptance by the courts, but mixed results at best.[13]

Finally, Thompson relies upon other agencies' interpretations of their own anti-retaliation statutes to argue for deference to the EEOC's position herein. However, there are fundamental differences between the deference afforded to those interpretations, as well as the statutes they have interpreted, which prevent such a comparison. Particularly, Thompson focuses upon interpretations of the NLRA by the NLRB, and the Department of Labor's interpretations of OSHA, MSHA, the Fair Labor Standards Act, and the Equal Pay Act. His reliance is misplaced, as courts have afforded those agencies a much greater level of deference than that afforded to the EEOC. *See e.g., CH2M Hill, Inc. v. Herman*, 192 F.3d 711 (7th Cir. 1999) (interpretation of OSHA standard); *United Food and*

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13. *See e.g.Fogleman v. Mercy Hospital*, 283 F.3d 561 (3rd Cir. 2002); *EEOC v. Wal-mart Stores, Inc.*, 576 F.Supp.2d 1240 (D.N.M. 2008); *U.S. EEOC v. Bojangles Rest. Inc.*, 284 F.Supp.2d 320 (M.D.N.C. 2003), in which the courts rejected the EEOC's position that third-party causes of action are valid under federal anti-retaliation laws.

Commercial Workers Union, Local 1036 v. NLRB, 307 F.3d 760, 766 (9th Cir. 2002) ("Courts are required to defer to the NLRB on statutory interpretation under *Chevron*"); *Olson v. Federal Mine Safety and Health Review Commission*, 381 F.3d 1007 (10th Cir. 2004) (interpretation of MSHA); *Wal-mart Stores, Inc. v. Secretary of Labor*, 406 F.3d 731 (D. D.C. 2005) (interpretation of OSHA); *SEIU, United Healthcare Workers-West v. NLRB*, 574 F.3d 1213, 1214 (9th Cir. 2009) ("The *Chevron* doctrine requires that this court defer to the NLRB's interpretation of the NLRA"); *General Service Employees Union, Local No. 73, SEIU, AFL-CIO, CLC v. NLRB* , 230 F.3d 909, 913 (7th Cir. 2000)("The Court has made it clear in a number of decisions that the NLRB is one of the agencies to which *Chevron* deference is owed.").

Conversely, federal courts have acknowledged the EEOC's limited role in Title VII proceedings. As the United States District Court for the District of New Jersey has recognized, "[t]he EEOC merely processes complaints pursuant to the federal regulations. Any EEOC determination is non-final and non-binding . . . . The EEOC is merely a conduit which funnels employment discrimination claims to the federal court." *Connor v. U.S. EEOC*, 736 F.Supp. 570, 573 (D.N.J. 1990). *See also Hill v. Rayboy-Brauestein*, 467 F.Supp.2d 336, (S.D.N.Y. 2006) ("[E]very court that has considered the issue has found that EEOC determinations have no preclusive effect."); *Barnett v. Revere Smelting & Refining Corp.*, 67 F.Supp.2d 378, 390 n. 5 (S.D.N.Y. 1999) (recognizing that EEOC findings are not binding on the court); *Krasner v. HSH Nordbank AG*, 680 F.Supp.2d 502, 515 (S.D.N.Y. 2010) (recognizing that the EEOC's

position set forth in its Policy Guidance is not binding on the courts); *Hamilton v. Texas Department of Transportation*, 206 F.Supp.2d 826, 834 (S.D. Tex. 2001); *Jones v. Berge*, 172 F.Supp.2d 1128, 1132 (W.D.Wisc. 2001); *Sherwood v. Evans*, 422 F.Supp.2d 181, 187 (D. D.C. 2006); *Antrum v. Washington Metropolitan Area Transit Authority*, 2010 WL 1840838 at *5 (D. D.C. 2010); *Francis v. District of Columbia*, 2010 WL 3257368 at *8 n. 7 (D. D.C. 2010). No credible comparison can be made between the deference afforded to these agency interpretations and those of the EEOC. Hence, it is improper to look to the EEOC Compliance Manual for Guidance on this issue.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

APPENDIX A — STATUTES INVOLVED

Title VII
42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.

Appendix A

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . to discriminate against any individual . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e-5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.

(b) Charges by persons aggrieved or member of Commission of unlawful employment practices by employers etc . . .

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer . . . has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge . . . on such employer . . . within ten days, and shall make an investigation thereof. . . .

Appendix A

(f) Civil action by Commission . . . or person aggrieved . . . .

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . . The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission . . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section . . . the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . .

Appendix A

Fair Housing Act, Title VIII:

3610, Pub. L. No. 90-284, Title VIII, § 810, Apr. 11, 1968, 82 Stat. 85, *repealed* by Pub. L. No. 100-430, § 8(2), Sept. 13, 1988, 102 Stat. 1625.

(a) Any person who claims to have been injured by a discriminatory housing practice or who believes that he will be irrevocably injured by a discriminatory housing practice that is about to occur (hereafter "person aggrieved") may file a complaint with the Secretary. . . .

(c) If within 30 days after a complaint is filed with the Secretary or within thirty days after expiration of any period of reference under subsection (c), the Secretary has been unable to obtain voluntary compliance with this title, the person aggrieved may, within thirty days thereafter, commence a civil action in any appropriate United States district court, against the respondent named in the complaint, to enforce the rights granted or protected by this title, insofar as such rights relate to the subject of the complaint.

Appendix A

42 U.S.C. § 3602(i) (1988)

(i) "Aggrieved person" includes any person who –

(1) claims to have been injured by a discriminatory housing practice; or

(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

42 U.S.C. § 3613(a) (1988)

(a) Civil Action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or breach of the conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

APPENDIX B — DEPOSITION TRANSCRIPT AND EXHIBIT

EXHIBIT 4

Equal Employment Opportunity Commission

DISMISSAL AND NOTICE OF RIGHTS

To:

Miriam Regalado
118 South Ash Drive
Hanover, IN 47243

From:

Equal Employment Opportunity Commission (EEOC)
Louisville Area Office
600 Dr. Martin Luther King Jr. P
Suite 268
Louisville, Kentucky 40202

On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 CFR § 1601.7(a))

Charge No.
241-2003-00828

EEOC Representative
Kenneth Jackey, Investigator

Telephone No.
502-582-5746

THE EEOC IS CLOSING ITS FILE ON THIS CHARGE FOR THE FOLLOWING REASON:

Appendix B

* * *

[X] The EEOC issues the following determination: Based upon its investigation, the EEOC is unable to conclude that the information obtained establishes violations of the statutes. This does not certify that the respondent is in compliance with the statutes. No finding is made as to any other issues that might be construed as having been raised by this charge.

The EEOC has adopted the findings of the state or local fair employment practices agency that investigated this charge.

* * * *

On behalf of the Commission

s/ Susan Ryan
for
Marcia Hall-Craig, Director

12-17-03
(Date)

* * * *

Q. Okay. Eric Thompson, your husband, does not work for the same employer; is that correct?

A. Yes, that's correct.

Q. What was the name of his employee?

A. Schlosser Forge.

Q. Okay. When did -- when did you leave NAS, North American Stainless?

A. January 15th, 2004.

Q. Between that -- that time and the time that you became employed by TAMCO Steel did you hold other employment?

A. Yes. I was at Trinity Industries in Navasota, Texas.

Q. How long?

A. Ten months.

Q. What did you do there?

A. I was Quality Control Engineer -- or, I'm sorry, Quality Control Manager.

Q. What type of a facility is Trinity Industries?

A. They make forgings, they make -- their primary product is heads for railcar industry, pressure vessels.

* * *

[WHEREUPON, document referred to is marked Exhibit 4 for identification.]

BY MR. MONGE:

Q. Now, the -- the numbers don't seem to -- to match up; okay. I mean, I'll -- I will tell you that -- that they -- they appear to have carried the same number on to both of the charges, but they're showing a different charge number up here.

A. [examines document] Yes.

Q. Did you receive what's now marked Exhibit Number 4?

A. Yes, I did.

Q. And it's on or about, it looks like December the 17th of 2003; correct?

A. Yes.

Q. And you were still employed at North American Stainless?

A. Yes.

Q. Okay. Do you know if this related the second complaint that you filed?

A. Yes, I know that for a fact.

Q. Okay. Who told you that?

A. Mr. Ken Jackey.

Q. Okay. Did -- when you filed that second complaint against North American Stainless, did you talk to Mr. Jackey prior to filing that complaint?

A. Yes, I did.

Q. Did he offer you any suggestions about filing that, whether you should or should not file it?

A. He suggested that I should go ahead and file the second charge.

Q. What do you remember telling him that prompted him to suggest that you file that second charge?

A. What I do remember is that I told them that I noticed that the workplace environment went hostile. And I told him that I figured it was due to the first charge I had filed.

* * *

Q. Okay. The second one, you said, related to retaliation. And I asked you about -- and I think you said there had been hostile workplace. But then you said that -- that Eric Thompson had not yet been terminated when you filed that. What retaliation was going on before Eric Thompson was terminated? Does that help you at all?

A. I'm trying to remember. I -- I can't recall.

Q. Okay. Well, you see my dilemma is this, that -- that if -- if you're trying to say the workplace became more hostile when they started having these personnel improvement programs, that didn't happen until the fall of 2003. And yet you -- you clearly had filed your second complaint before that because North American Stainless gets a notice in March of two thousand and -- March of 2003.

A. Yeah, I see the date.

Q. Let me ask you this, Mrs. Thompson: Did -- did you file a third complaint?

A: No.

Q. Well, I'm not going to -- if all of a sudden you have a vision as to what that was about, just pipe up and say it, because I -- I don't know how else to -- we'll just have to leave the record the way it is, if she doesn't know. Let's move on.

MR. MONGE: 6?

THE REPORTER: No, 5.

MR. MONGE: 5.

[WHEREUPON, document referred to is marked Exhibit 5 for identification.]

BY MR. MONGE:

Appendix B

* * *

Q. Okay. Did you continue to try to figure it out?

A. No. It -- it didn't take us long because Ken Jackey phone called me -- or, you know, called me on the phone later.

Q. Mr. Jackey from the EEOC?

A. Yes.

Q. Okay. And when did he call you?

A. It was the following week after Eric was terminated.

Q. And what was the purpose of his call?

A. He was just updating me on what had happened with, you know, these -- this -- actually, being that the second letter is dated 3/10/2003, which is the second charge. And that's when I told him that Eric, you know, had been terminated.

Q. Okay. And what did he say to you, "he," Mr. Jackey?

A. He said, "Well, are you thinking what I'm thinking?" And I said, "I -- yeah, think so." He's like, "Yeah." And he said, "Well, I think it's due to his association with you, being that you're engaged to be

married, and since you had first filled out a complaint." That's when, you know, their second target was Eric and he was fired due to, you know, being associated me. It's a form of retaliation.

Q. Now, am I correct, though, in understanding that, as we sit here today, both of the charges that you filed with the EEOC have been dismissed?

A. Yes.

Q. Okay. So, Mr. Jackey, I think your words were, "Are you thinking what I'm thinking." Did he make some suggestion as to what -- what should be done?

A. He just said, "Well, let me mail you a questionnaire, you know, it'll be for Eric, and you-all get it in the mail."

* * * *

REPLY BRIEF

No. 09-291

Supreme Court, U.S.
FILED
NOV 22 2010
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In The
Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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I. THIRD-PARTY REPRISALS VIOLATE SECTION 704(a) OF TITLE VII

The first question presented is whether section 704(a) forbids an employer from retaliating for protected activity "by inflicting reprisals on a third party, such as a spouse, family member or fiancé, closely associated with the employee who engaged in such protected activity." (Pet. i). Such reprisals are unlawful in that they "discriminate against an[ ] ... employee[ ] ... because he has opposed" practices forbidden by Title VII. 42 U.S.C. § 2000e-(3)(a). It is unclear whether respondent contends that such reprisals are legally permissible.

Some passages in respondent's brief suggest that third-party reprisals may be forbidden. (E.g. R.Br. 7 ("Thompson's concern that employers will be free to retaliate against family members ... is unfounded"), 8 ("The summary judgment of the district court left Regalado's right to pursue a retaliation claim intact")). Elsewhere respondent indicates doubt that such reprisals are unlawful. (R.Br. 33 ("even if [firing Thompson to retaliate against Regalado] violates Title VII's anti-retaliation provision")). Respondent advised the court of appeals that

> if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to § 704(a) and, under *Burlington Northern* [*& Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006)], defendant's termination of Thompson potentially could

> be deemed an "adverse employment action" against her.

(Pet. App. 29a n.10). Respondent presumably meant by that assurance that such an action by Regalado would actually state a claim on which relief could be granted, and was not merely acknowledging that Regalado would be free to file a complaint alleging such a (possibly legally insufficient) claim.

Respondent argues that this Court should not decide whether in the instant case the employer in fact acted with a retaliatory motive when it dismissed Thompson. We agree that question is not before the Court. This factual issue was not raised by respondent's motion for summary judgment, which (although framed as a motion for summary judgment) challenged the legal sufficiency of Thompson's claim. See Fed. Rule Civ. Pro. 56(f) (summary judgment on grounds not raised by a party may be granted only "[a]fter giving notice and a reasonable time to respond").

Respondent also argues that this Court should not decide whether in this case the dismissal of Thompson was "materially adverse," the standard established by *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). (R.Br. 47-48). Here too we agree. A retaliatory act is materially adverse if "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern*, 548 U.S. at 67 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219

(D.C.Cir. 2006)). Fear that an employer would dismiss a fiancé or family member would in most circumstances be likely to dissuade a reasonable employee from complaining about unlawful discrimination. But *Burlington Northern* made clear that "the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." 548 U.S. at 69. Thus in *Burlington Northern* the Court insisted that it was for the jury to determine whether the material adversity standard had been met in that case, and the Court reviewed the relevant trial testimony before concluding that the evidence was sufficient to support such a jury determination. E.g. 548 U.S. at 70 ("Based on this record, a jury could reasonably conclude that the reassignment of responsibilities would have been materially adverse to a reasonable employee.").

It would ordinarily be true that fear of dismissal of a fiancé or family member would deter an employee from engaging in protected activity. But respondent is entitled to an opportunity to offer evidence that in the circumstances of this case a reasonable employee in Regalado's position would not have been dissuaded from opposing discrimination even if she had known that it would result in Thompson's dismissal. At trial the controlling standard will be whether a reasonable person in the position of Regalado (not in Thompson's position) would have regarded the dismissal of Thompson as materially adverse.

Respondent devotes a significant portion of its merits brief to a different liability theory. Even if

section 704(a) forbids third-party reprisals, respondent argues, section 704(a) does not *also* give to other employees a "right to associate" with workers who have opposed discrimination. (R.Br. 15, 16, 19).[1] In other words, regardless of whether the alleged third-party reprisal in this case violated a right of Regalado, respondent contends that the reprisal did also not violate some separate right of Thompson himself to associate with Regalado. We do not contend that the third-party reprisal alleged in this case violated any such right of association to which Thompson was entitled; we urge only that the reprisal violated the rights of Regalado.

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[1] If section 704(a) embodied a right of association, respondent objects, the courts would have to develop some legal definition of which types of associations are protected, and an employer would have to investigate the private lives of its workers to ascertain the personal relationships among them. (R.Br. 8, 23, 26-27).

The theory of liability that we advance in this case, however, poses no such difficulties. The identity of individuals who might have a claim is a function of the employer's own intent; the only individuals with potential claims are those whom the employer itself intended to punish as a means of retaliating against a worker who engaged in protected activity. The identity of the individuals whom the employer intended to punish would of course be known to a retaliatory employer. An employer would have no reason to investigate the personal relationships of its workers, except as part of an unlawful scheme to identify a potential target for a third-party reprisal. An employer's ignorance of a private relationship between two workers would necessarily bar a third-party reprisal claim.

The prohibition against third-party reprisals does not mean, as respondent suggests, that section 704(a) somehow forbids an employer to discipline any worker who happens to be related to or closely associated with an employee who has engaged in protected activity. (R.Br. 8, 14, 25, 27). Even the very employee who engaged in such protected activity remains subject to the normal disciplinary standards and processes; so long as an employer is acting for a lawful reason, it may for example dismiss a worker who has filed a charge with the EEOC or has brought suit under Title VII. Family members and others connected to an individual who engaged in protected activity also remain subject to lawfully motivated adverse employment actions.

II. SECTION 706(f)(1) AUTHORIZES SUITS BY THE VICTIMS OF THIRD-PARTY REPRISALS

The second question presented is whether Thompson can himself maintain an action if respondent dismissed him in order to retaliate against Regalado for her opposition to gender-based discrimination. Thompson has standing to do so for two independent reasons. First, Thompson's claim falls within the established exception to the prudential standing rule barring claims based on a violation of the rights of a third party. Second, even if the general rule regarding claims based on the rights of third parties would otherwise apply here, section 706(f)(1) authorizes such suits by an employee injured by a violation of the right of another worker.

A. Thompson's Claim Falls Within The Exception To The Prudential Rule Barring Claims Based On The Rights of Third Parties

Although a litigant must generally base a claim on a violation of his or her own legal rights, that prudential standing rule does not apply in all cases. As we explained in our opening brief, the nature of Thompson's claim, and his relationship with Regalado, clearly place Thompson in the category of plaintiffs to whom this Court's decisions accord third-party standing. (Pet. Br. 39-45). Respondent refers to the general prudential rule (R.Br. 9, 36-37), but advances no argument in response to our contentions that this case satisfies the standards established by this Court to warrant third-party standing.

If, as we urge, Thompson's claim satisfies the requirements for third-party standing, he is entitled to maintain this action unless the terms of Title VII itself somehow create an additional obstacle and affirmatively exclude claims by individuals who have such third-party standing. It is unclear whether respondent contends that section 706 contains such an affirmative prohibition. Section 706 does not.

B. The Victim of A Third-Party Reprisal Is A "Person Aggrieved" Within The Meaning of Section 706

Section 706(f)(1) of Title VII provides that a civil action may be brought by a "person ... aggrieved." Thompson is a "person aggrieved" within the meaning of the statute.

(1) Respondent urges this Court not to decide whether Thompson is a "person aggrieved" under section 706. (R.Br. 26-30). But that issue is certainly encompassed within the scope of the question presented; the circuit conflict regarding the meaning of "person aggrieved" was a linchpin of the certiorari petition. (Pet. 34-37).[2]

Respondent insists that the en banc majority never decided, or even mentioned, the scope of the statutory authorization of suit by a "person ... aggrieved." (R.Br. 30 ("the issue ... was clearly not addressed by the majority"); see *id.* at 28 ("[t]he decision by the *en banc* majority does not mention the enforcement provision"). That is not correct. The majority squarely addressed this very issue, holding that Thompson was indeed a "person aggrieved" with standing to sue.

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[2] The dispute about the meaning of the phrase "person aggrieved" was also addressed in the Reply Brief for Petitioner, at 6, the Brief for the United States as Amicus Curiae, at 16-17, and the Supplemental Brief for Petitioner, at 9-12.

> Distinct from the question whether Thompson has asserted a cause of action under § 704(a), his *standing* to assert his Title VII retaliation claim is not at issue in this appeal.... The remedial section of Title VII, 42 U.S.C. § 2000e-5(f)(1), empowers a "person claiming to be aggrieved" to bring a civil action to enforce ... the statute.... We have held that the "person claiming to be aggrieved" language of § 2000e-5 shows a congressional intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution.... Defendant does not challenge Thompson's standing as an "aggrieved" person....

(Pet. App. 9a-10a n.1) (emphasis in original). Three of the four other opinions in the en banc court also addressed this issue. (Pet. App. 32a (Rogers, J., concurring), 50a-53a (Moore, J., dissenting), 58a-63a (White, J. dissenting)). Petitioner is assuredly permitted to advance in this Court the same interpretation of "person aggrieved" that was accepted by the majority opinion and two separate opinions in the Sixth Circuit.

Respondent asserts that in its Brief in Opposition it "specifically objected to the inclusion of this issue by Thompson.... *See* Brief in Opposition 26-27." (R.Br. 29). The most specific statement about this issue in the Brief in Opposition, however, was that "[t]he Sixth Circuit did acknowledge ... that NAS did not challenge Petitioner's standing as an 'aggrieved' person under § 2000e-5(f)(1)." (Br. Opp. 27 n.10).

In its Brief in Opposition respondent argued only that it was irrelevant that Thompson was a "person aggrieved," which it had not disputed below, because Thompson nonetheless lacked a cause of action.

> Petitioner ... argues that because he is "aggrieved" pursuant to § 2000e-5(f)(1), he therefore has a cause of action. However, this Court recognized the difference between being "aggrieved," and thus having standing, and having a viable cause of action.... Whether one is "aggrieved" under § 2000e-5(f)(1) is a question of standing, not whether he has a cause of action.... Thus, the fact that Petitioner may be "aggrieved" under § 2000e-5(f)(1) is not dispositive of whether he has a cause of action under § 2000e-3(a).

(Br. Opp. 26-27). Respondent cannot complain now about its earlier decision to advance a more limited argument. See Supreme Court Rule 15.2.

(2) Thompson is certainly "aggrieved" in the ordinary meaning of that term; he alleges that he was fired from his job and that he "has suffered lost wages, fringe benefits, and other" damages.[3] Such a claim falls easily into the ordinary definition of "aggrieved." Random House Webster's College Dictionary, 27 (1991) ("wronged, offended, or injured"); Funk & Wagnall's Standard Dictionary of the English Language, 28 (1966) ("[s]ubjected to ill-treatment;

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[3] Complaint, ¶ 15.

feeling an injury or injustice"); Chambers English Dictionary, 25 (1988) ("injured; having a grievance"); American Heritage Dictionary of the English Language, 25 (1969) ("[f]eeling distress or affliction ... [t]reated wrongly; offended"). In ordinary English it would make no apparent sense to say that a worker was not "aggrieved" by being fired from a job he wanted to keep. It would seem equally peculiar to state that only the worker's fiancé, but not the dismissed worker himself, was aggrieved.

Respondent objects that section 706 refers to a person who was "aggrieved," rather than to a person who was "injured" by a violation. (R.Br. 31, 35-36). "Injured," respondent insists, is not the "ordinary meaning" of "aggrieved." (R.Br. 35). But as the dictionaries quoted above make clear, "injured" clearly is one of the common meanings of "aggrieved." Federal courts often treat "aggrieved" and "injured" as synonyms.[4] Private enforcement of Title VII would have been significantly impaired if Congress had

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[4] E.g., *ATACS Corp. v. Trans World Communications, Inc.*, 155 F.3d 659, 669 (3d Cir. 1998) ("This is especially so where an injured party is entitled to recover for breach of contract, but recovery based on traditional notions of expectation damages is clouded because of the uncertainty in measuring the loss in value to the aggrieved contracting party"); see *Ex parte Wall*, 107 U.S. 265, 277-78 (1980) ("This expression, about leaving the party aggrieved to his remedy by a criminal prosecution, is frequently found in English cases, and has reference to the practice in that country of regarding the party injured by the perpetration of a crime as the proper person to prosecute the offender.").

limited lawsuits to claims by "persons injured" rather than by "persons aggrieved." Such a limitation would have restricted civil actions to plaintiffs who had already been harmed, and would have precluded suits, seeking prospective injunctive relief, brought by plaintiffs who asserted that in the future they would be harmed (e.g., because an employer intended in the next year to lay off all its non-white workers) or were likely to be harmed (e.g., because an employer intended in the next year to promote women only if they were far better qualified than any male applicant).

Construing "person aggrieved" to include the direct victims of third-party reprisals is "more consistent with the broader context of Title VII and the primary purpose of § 704(a)." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). In the specific context of Title VII, "person aggrieved" cannot have a meaning that would as a practical matter render the statute unenforceable in certain circumstances. In the case of third-party reprisals, that would often be precisely the consequence of interpreting "aggrieved" to authorize suit only by the person who had engaged in protected activity, but not by the individual who was the direct victim of the reprisal. As we explained in our opening brief, the employee who engaged in the protected activity ordinarily would not have Article III standing to seek monetary or injunctive relief for the reprisal victim. (Pet. Br. 43-44; Supplemental Brief for Petitioner, 3-7). Respondent does not address that constitutional obstacle, and advances no

argument as to how, for example, Regalado would have had Article III standing to seek an award to Thompson of backpay or compensatory damages.

Some lower courts have suggested that it does not matter if the prohibition against third-party reprisals is unenforceable, speculating that family members or other possible third-party reprisal victims will invariably have supported or assisted in some way the employee who engaged in protected activity, and thus will have retaliation claims of their own. No empirical evidence is offered to justify this contention. Many forms of opposition are unlikely to have involved any such outside support. See, e.g., *Crawford v. Metropolitan Government of Nashville and Davidson County*, 129 S.Ct. 846 (2009) (employee opposed sexual harassment by answering question from employer). The mere fact that such support or assistance was provided to another worker will not give rise to a colorable retaliation claim unless there is proof that the employer somehow knew of that aid; but assistance to a family member, such as urging that she file an EEOC charge, is unlikely to come to the attention of an employer. Even where employer knowledge could be shown, an employer could defeat a retaliation claim by demonstrating that it acted against the worker involved, not because he himself had aided someone else (and thus engaged in protected activity of his own), but as a method of punishing that other worker; third-party reprisals, in effect, would be an affirmative defense to this sort of retaliation claim.

"[I]t would be destructive of th[e] purpose of the antiretaliation provision for an employer to be able to retaliate with impunity against an entire class of acts under Title VII." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). It would be equally destructive of that purpose if an employer could with impunity retaliate against an entire class of employees – those who could be intimated by retaliatory actions against their relatives or others with whom they are closely associated.

Respondent argues that permitting suits by the direct victims of third-party reprisals would impose serious burdens on employers and pose substantial practical difficulties for the courts. (R.Br. 6, 8, 22-25). But as respondent itself notes, a number of other federal statutes have already been construed to authorize just such claims. (R.Br. 53-54; Petition, 26-32). Respondent does not contend that any of the problems that it predicts would arise under Title VII have actually occurred under those other statutes, and offers no reason to believe that such difficulties would be more likely under Title VII than under other laws.

Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), cited with approval the Third Circuit decision in *Hackett v. McGuire Bros., Inc.*, 445 F.2d 442, 446 (3d Cir. 1971), which held that the phrase "person aggrieved" in section 706 evidenced "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." 409 U.S. at 367. The courts of appeals have long understood

Trafficante to mean that section 706 is to be construed in that manner.[5]

Respondent asserts that *Trafficante* is distinguishable on the ground that the plaintiffs in that case were "persons aggrieved" only because those plaintiffs "were asserting statutory violations of **their own** rights, not a third party's rights." (R.Br. 38) (emphasis in original). The plaintiffs in *Trafficante* were residents of an apartment complex that allegedly had excluded nonwhites on the basis of race, in violation of Title VIII of the Fair Housing Act. According to respondent those plaintiffs alleged that "**they** had a right under Title VIII to live in integrated housing and that **their right** to live in integrated housing had been violated." (R.Br. 40) (emphasis in original). That is not correct. The plaintiffs only "claimed ... they had lost the social *benefits* of living in an integrated community" because of discrimination against others; the plaintiffs did not assert that Title VIII guaranteed them a legal right to reside in integrated housing. 409 U.S. at 208 (emphasis added).

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[5] *Palmer v. Occidental Chemical Corp.*, 356 F.3d 235, 237 (2d Cir. 2004); *Anjelino v. The New York Times Co.*, 200 F.3d 73, 90, 91 and n.25 (3d Cir. 2000); *Abron v. Black & Decker (U.S.) Inc.*, 654 F.2d 951, 964 (4th Cir. 1981); *EEOC v. Mississippi College*, 626 F.2d 477, 481-83 (5th Cir. 1980); *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 289, 295 (7th Cir. 2000); *Clayton v. White Hall School Dist.*, 875 F.2d 676, 679 (8th Cir. 1989); *Waters v. Heublein, Inc.*, 547 F.2d 466, 469 (9th Cir. 1976); *Gray v. Greyhound Lines, East*, 545 F.2d 169, 175-76 (D.C.Cir. 1976).

Respondent asserts that "[t]he court [in *Trafficante*] determined that Title VIII's definition of 'person aggrieved' ... evidence[d] 'a congressional intention to define standing as broadly as is permitted by Article III of the Constitution.'" (R.Br. 39-40). The material quoted in *Trafficante* regarding "congressional intention," however, is actually from the holding in *Hackett v. McGuire Bros, Inc.*, 445 F.2d 442, 446 (3d Cir. 1971), regarding the meaning of the words "person claiming to be aggrieved" in section 706 of Title VII. 409 U.S. at 367. *Trafficante* relied in part on the fact that in enforcing Title VIII "the main generating force must be private suits," because government enforcement of Title VIII was limited to a handful of pattern or practice suits that might be brought by the Department of Justice. 409 U.S. at 211. Respondent asserts that there is a "difference in the enforcement mechanisms" under Title VIII and Title VII. (R.Br. 42). To the contrary, as we explained in our opening brief, when Title VII was enacted in 1964 (and the phrase "person aggrieved" was adopted) the enforcement mechanism under Title VII was the same as under Title VIII. (Pet. Br. 37-38).

Respondent also attempts to distinguish *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). (R.Br. 43; cf. Pet. Br. 10-11, U.S. Br. 21-22). Respondent contends that the plaintiff in *McCready* "was not, like Thompson in this case, asserting she had been injured by the violation of some third-party's rights." (R.Br. 43). But the plaintiff in that case was making the same type of assertion; McCready claimed that

she was harmed by a conspiracy involving a state organization of psychiatrists that sought to exclude psychologists from the market. That is why the defendants argued that "only psychologists might maintain suit." 457 U.S. at 479. Even though policy holders were not the target of that conspiracy, this Court held that McCready could sue because economic injury to her was "the very means by which it is alleged that [the conspirators] sought to achieve [their] illegal ends." *Id.* at 479. In the instant case injury to Thompson was similarly the "very means" by which respondent sought to achieve the illegal end of retaliating against Regalado.

Respondent argues that the phrase "person aggrieved" in Title VII should be given the same interpretation as the phrase "person ... adversely affected or aggrieved" in section 10(a) of the Administrative Procedure Act, which encompasses individuals or entities within the zone of interests protected by the underlying statute. 5 U.S.C. § 702 (R.Br. 32-34). Section 10(a) delineates those who can seek review of federal "agency action." But in enacting section 706(f) as part of the 1964 Civil Rights Act, Congress assuredly did not intend to incorporate by reference the APA "zone of interests" standard; that standard was not articulated by this Court until 1970, six years after the adoption of Title VII. *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 156 (1970). There is little reason to think that Congress in 1964 intended to tie the meaning of "person aggrieved" in Title VII to unforeseeable future

developments in the interpretation of the Administrative Procedure Act. The term "aggrieved" is used in hundreds of provisions in the United States Code, modifying nouns such as "person" or "party." The interpretation of each of these provisions turns on the statutory context in which it occurs.

Discrimination and retaliation claims under Title VII have little in common with judicial review of federal agency actions under the Administrative Procedure Act. The typical Title VII plaintiff is challenging a specific employment decision; when originally enacted in 1964 Title VII did not apply at all to employment decisions by federal officials. An individual employment decision, unlike agency actions subject to review under the APA, usually involves only a few workers and thus rarely poses problems similar to review of agency action. See *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 395 (1987). It seems most appropriate to give the phrase "person aggrieved" in Title VII the same meaning that it has under other civil rights statutes,[6] which have far more in common with one another than with the type of litigation that occurs under the APA.

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[6] In addition to its use in Title VII and Title VIII, references to a person or employee "aggrieved" are also found in Title I of the 1964 Civil Rights Act, 42 U.S.C. § 2000a-3, in section 505(a)(1) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(1), in the Voting Rights Act, 42 U.S.C. § 1973a(a), and in several provisions of the Age Discrimination in Employment Act. 29 U.S.C. §§ 626(c)(1), 633a(c).

The APA standard, in any event, is more inclusive than respondent suggests. Relying on this Court's interpretation of section 10(a), respondent argues that

> Thompson is ... not aggrieved within the meaning of the statute because he is not the intended beneficiary of Title VII's anti-retaliation protections. He is not the intended beneficiary because he did not engage in any protected conduct.

(R.Br. 33). But the zone of interest test

> is not meant to be especially demanding; in particular, there need be no indication of congressional purpose to benefit the would-be plaintiff.

Clarke v. Securities Industry Association, 479 U.S. 388, 399-400 (1987).

> In cases where the plaintiff is not itself the subject of the contested regulatory action, the test denies a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.

Id. at 399. But in this case the plaintiff *is* the subject of the contested action, and his interest in continued employment is not "marginally related" to the decision to fire him.

Respondent relies on a 1998 lower court concurring opinion which, based in part on a narrow reading of the phrase "person aggrieved" under section 10(a) of the APA, insisted that "person aggrieved" in section 706(f)(1) was a "term of art ... that ... includes prudential limits on standing." (R.Br. 35) (quoting *Childress v. City of Richmond, Virginia*, 134 F.3d 1205, 1209 (3d Cir. 1998) (Luttig, J., concurring)). But only six months after that lower court decision, this Court (also citing section 10(a)) held precisely the opposite.

> History associates the word "aggrieved" with a congressional intent to cast the standing net broadly – beyond the common-law interests and substantive statutory rights upon which "prudential" standing traditionally rested.... Cf. Administrative Procedure Act, 5 U.S.C. § 702.

Federal Election Commission v. Akins, 524 U.S. 11, 19 (1998).

C. Section 706(f)(1) Provides An Express Private Cause of Action for Individuals With Claims Under Title VII

Like the en banc majority below, respondent argues that even if Thompson is a "person aggrieved," he still lacks a private cause of action under Title VII. Respondent relies on this Court's decisions in *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979), and *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979). (R.Br. 15).

Touche Ross and *Cannon*, however, set forth the standard for determining whether the courts should *imply* the existence of a private cause of action where the language of a statute contains no express private cause of action. *Touche Ross*, 442 U.S. at 562 ("we are called upon to decide whether a private remedy is implicit in a statute not expressly providing one"); *Cannon*, 441 U.S. at 717 ("Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present. We ... conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute.")

Section 706(f)(1), however, contains just such an express private cause of action to enforce Title VII. (See Pet. Br. 46-49; Brief for the United States as Amicus Curiae Supporting Petitioner, 24). This Court in *Cannon* noted the existence of this very express private cause of action. 441 U.S. at 710 and n.45 ("other Titles of the Civil Rights Act of 1964 ... created express private remedies.... See 42 U.S.C. §§ 2000e-5(f)(1), (3) (Title VII).")

III. THE EEOC'S INTERPRETATION OF SECTIONS 704(a) AND 706(f)(1) IS ENTITLED TO DEFERENCE

The language and context of sections 704(a) and 706(f)(1) make clear that third-party reprisals are unlawful, and that the direct victims of third-party

reprisals may obtain judicial relief for such violations. To the extent that the terms of those provisions may appear ambiguous, deference should be given to the EEOC's consistent interpretation of the two statutory provisions at issue.

Respondent argues that the Commission's interpretation of Title VII is essentially irrelevant, because the construction of sections 704(a) and 706(f)(1) is a matter to be resolved based on the "traditional tools of statutory construction," which are "within the special expertise of courts, not agencies." (R.Br. 52) (quoting *Lee v. Sullivan*, 787 F.Supp. 921, 937 (N.D.Ca. 1992)). But unless the language of section 704(a) (or section 706(f)(1) as the method by which section 704(a) is enforced) unequivocally requires a contrary result, the touchstone of sound interpretation is to avoid a construction that would "undermine the effectiveness of Title VII by allowing the threat of ... retaliation to deter victims of discrimination from complaining to the EEOC," or from opposing such discrimination at work. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

The essential purposes of 704(a) are "[m]aintaining unfettered access to statutory remedial mechanisms," *Robinson v. Shell Oil Co.*, 519 U.S. at 346, and "preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of [Title VII's] basic guarantees." *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). In any particular case the determination of whether a given retaliatory act

would be likely to obstruct employee efforts to obtain compliance with Title VII usually is – as respondent itself insists – a fact-bound question for the trier of fact. See *Burlington Northern*, 548 U.S. at 70-73. The determination of whether the purposes of section 704(a) would be undermined by permitting an entire category of retaliatory acts – in this instance retaliation against closely associated third parties – is an intensely practical question. In resolving that issue, the judgment and experience of the EEOC are entitled to significant weight.

The Commission's longstanding view that section 704(a) prohibits third-party reprisals reflects more than just the agency's reading of the words of the statute and the relevant caselaw.[7] As the federal

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[7] The cases cited in the EEOC Compliance Manual support the agency's interpretation of Title VII. *Murphy v. Cadillac Rubber & Plastics, Inc.*, 946 F.Supp. 1108 (W.D.N.Y. 1996), held that a plaintiff states a cause of action on which relief can be granted by alleging "protected activity by a close relative, disadvantageous employment action, and a timeframe indicating a causal connection between the two." 946 F.Supp. at 1118. Respondent notes that the plaintiff in *Murphy* had asserted that he had assisted his wife in her own complaints of discrimination. (R.Br. 50). But the plaintiff did not allege that the employer was aware of that assistance, or that that assistance was a motivating factor in the actions taken against him by the employer. Rather, the plaintiff asserted only that the employer was retaliating against him because of his wife's complaints.

In *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993), the court of appeals endorsed the view that "if an employer retaliated against a close relative of the person engaging in protected activity, the relative may bring a claim under 42

(Continued on following page)

agency responsible for the day-to-day enforcement of Title VII, the EEOC draws on a broad body of experience in evaluating the likely impact of that category of reprisals. The Commission has several major responsibilities: investigating and evaluating the large number of discrimination complaints filed each year by individual employees, authorizing the commencement and settlement of civil actions against private employers, adjudicating appeals by federal employees of agency decisions involving discrimination claims, and coordinating overall federal equal employment opportunity policies. Those interrelated roles give the Commission a deep understanding of the realities of the workplace and of the practical problems involved in implementing Title VII.

With regard to the substantive requirements of section 704(a), the EEOC has long maintained that

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U.S.C. 2000e-3(a), even though the relative was not the person engaging in the protected activity." 7 F.3d at 543; see 7 F.3d at 544 ("We agree ... that a plaintiff's allegation of reprisal for a relative's antidiscrimination activities states a claim upon which relief can be granted under Title VII.")

Respondent suggests that *Thurman v. Robertshaw Control Co.*, 869 F.Supp. 934 (N.D.Ga. 1994) does not support the Commission's position because the court in that case "ultimately granted summary judgment to the employer on those claims." (R.Br. 51). But summary judgment was granted only on the ground that there was insufficient evidence that the protected activity of the plaintiff's wife was the reason for the plaintiff's dismissal. 869 F.Supp. at 941. The district court accepted plaintiff's theory that dismissal because of his wife's protected activity, if proven, would be actionable. 869 F.Supp. at 941 n.3.

the antiretaliation provision forbids reprisals against third parties who are so associated with the individual engaging in protected activity that the reprisals would be likely to deter those activities. In its brief in this Court, the Commission explains how such reprisals could be a potent tool for deterring employees from complaining to the Commission itself and from opposing discrimination in the workplace. (U.S. Br. 8, 11-13). The EEOC's considered evaluation of that intensely practical question, drawing upon the Commission's own unique and extensive experience dealing with charging parties, witnesses and plaintiffs, is entitled to deference unless clearly mistaken. Respondent does not appear to argue that EEOC has overstated the potential seriousness of third-party complaints.

The interpretation of section 706(f)(1), although involving a distinct question of statutory construction, turns to a significant degree on the practical implications of that construction for the viability of section 704(a). If section 706(f)(1) were interpreted in a manner that would preclude or seriously obstruct private enforcement of section 704(a) in a distinct category of retaliation cases, the viability of section 704(a) itself would in that respect be undermined. Here too the Commission has long maintained that third-party victims can themselves maintain an action under section 706(f)(1). In its brief in this Court, the EEOC explains the practical importance of such civil actions by the victims of third-party reprisals. (U.S.Br. 26-27). Respondent appears to disagree,

suggesting that the prohibition against third party reprisals might be enforced by the employee who had engaged in the protected activity. But that largely unexplained assertion is insufficient to overcome the deference due to the EEOC's evaluation of this intensely practical question.

Finally, respondent objects that some lower courts have disagreed with the Commission's interpretation of sections 704(a) or 706(f)(1). (R.Br. 49-50, 53 and n.13). But litigation in this Court ordinarily concerns legal issues regarding which the lower courts are divided. Thus it will usually be true that in cases in this Court that the position of the EEOC (or of any federal agency) conflicts with the decisions of at least some lower courts.

CONCLUSION

For the above reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

No. 09-291

In The Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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I. THE DECISION BELOW ENLARGES A SERIOUS GAP IN THE PROTECTIONS OF TITLE VII

The United States has long maintained that enforcement of Title VII and other federal employment statutes would be seriously obstructed if employers could with impunity retaliate against family members or others closely associated with employees who complain about illegal action, file charges with federal agencies, or bring private actions. (Pet. 18-22). The Solicitor General expressly reaffirms that position. The prospect that filing a lawsuit or an EEOC charge would lead to the dismissal of a family member or other closely associated person, the United States explains, "might very well persuade [a worker] not to file." (U.S.Br. 14). "[A]n employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their rights." (*Id.*) (*quoting Fogelman v. Mercy Hospital, Inc.*, 283 F.3d 561, 564 (3d Cir.2002)). The gap in the protections of Title VII to which the government objects clearly exists today in the Third and Eighth Circuits, where the United States concedes third party reprisals are lawful under Title VII. (U.S.Br. 7).

That same gap exists as well in the Sixth Circuit, which has rejected the only known method of private enforcement of Title VII – a lawsuit by an individual who was fired (or otherwise retaliated against) in violation of federal law. The deterrent effect of third

party reprisals is precisely the same if there is no prohibition against third party reprisals (as in the Third and Eighth Circuits), or if any such prohibition is as a practical matter unenforceable. The Sixth Circuit has indisputably held that an employee who is dismissed as a reprisal cannot sue for any relief whatever. The substitute enforcement mechanism hypothesized by the government does not exist under Title VII, and is inconsistent with the standing requirements delineated by this Court and long advocated by the United States itself.

The Solicitor General hypothesizes that there might in the future be a new, entirely novel method of redressing such a violation. The hypothesized proceeding would be brought by the worker who had engaged in protected activity, but would request no remedy for the plaintiff herself; instead the plaintiff would seek "recompense" for the dismissed worker who was not a party to the proceeding. (U.S.Br. 12). Thus in the instant case the government suggests that Ms. Regalado might file suit and ask the court to order the defendants to pay damages or backpay to Thompson.

The government does not contend that any federal court has ever actually permitted that sort of suit under Title VII, or indeed any other federal statute. Nor does it contend that the EEOC or Department of Justice have ever before suggested that Title VII could be enforced in this manner. The Solicitor General, although drawing on the considerable experience and resources of both the EEOC and

the Civil Rights Division, cannot identify a single case in the forty-five year history of Title VII in which any federal court has awarded this sort of relief for a non-party. The only Title VII case cited in the government's brief is one in which the dismissed worker was seeking back pay and other remedies for himself, and the court held that a district judge "has broad discretion to fashion appropriate equitable relief *for a Title VII plaintiff*," *Castle v. Rubin*, 78 F.3d 654, 657 (D.C.Cir.1996) (emphasis added), not equitable relief for someone other than the actual plaintiff.

The government suggests that in an individual Title VII action brought by one individual (e.g. Regalado) a federal court could "use[ ] its broad equitable power to fashion an appropriate remedy" for someone else (e.g. Thompson). (U.S.Br. 12). But in other briefs in this Court the Solicitor General has correctly pointed out that the power of a federal court is limited by the standing requirement of Article III.

> Article III of the Constitution limits the power of federal courts to deciding "Cases" and "Controversies." One aspect of the case or controversy requirement is that a party who invokes the jurisdiction of a federal court must have standing to sue.[1]

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[1] Brief for the United States as Amicus Curiae Addressing Standing, *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), at 9, available at 1996 WL 422137.

The government has on repeated occasions successfully invoked that standing requirement to persuade this Court to deny a plaintiff the most common form of equitable relief, an injunction.

The core standing requirement, the Solicitor General has often explained, is that a plaintiff have a "personal stake" in the outcome of a particular claim.[2] "To demonstrate standing, a plaintiff must have 'alleged such a personal stake in the outcome of the controversy as to warrant *his* invocation of federal-court jurisdiction.'" *Salazar v. Buono*, 130 S.Ct. 1803, 1814 (2010) (*quoting Horne v. Flores*, 557 U.S. ___, ___, 129 S.Ct. 2479, 2592 (2009) (emphasis in original)). A plaintiff's hope that a relative or close friend will receive a monetary award or a job is not such a "personal stake." If Mr. Thompson had been injured in an accident, Ms. Regalado obviously would not have had the requisite "personal stake" in whether a court might award damages to her fiance or husband. A litigant only has standing to seek "remediation of its own injury," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998), not remediation of harms done to others. Standing *is*

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[2] Within the last year alone the Solicitor General has filed three briefs making this very point. Motion to Dismiss or Affirm, *Rodearmel v. Clinton*, No. 09-797, at 13, available at 2010 WL 1848214 (May 10, 2010); Brief of Respondent in Opposition, *Curr-Spec Partners, L.P. v. C.I.R.*, 2010 WL 265882 (S.Ct. 2010), at 13, available at 2010 WL 1653078 (April 23, 2010); Brief for Petitioners, *Salazar v. Buono*, 130 S.Ct. 1803 (2010), at 12, available at 2009 WL 1526915 (June 1, 2009).

determined by the identity of the party to whom a court orders that monetary relief be paid. It does not "matter what the [plaintiff] do[es] with the money afterward." *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, ___, 128 S.Ct. 2531, 2543 (2008).

This constitutional requirement cannot be avoided by joining a claim for which standing is lacking with a separate claim for which standing is present. As the Solicitor General has pointed out on several occasions, standing must be separately established for each item of relief requested.

> [A plaintiff] bears the burden of demonstrating that he has standing to seek that additional form of relief. See *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1148 (2009) ("[A plaintiff] bears the burden of showing that he has standing for each type of relief sought.")[3]

"[A] plaintiff must demonstrate standing separately for each form of relief sought." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 185 (2000). In a third party reprisal case, the worker who engaged in protected activity

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[3] Reply Brief for the Petitioners, *Salazar v. Buono*, at 5, available at 2009 WL 2625777; see Brief of Appellee, *Davis v. Federal Election Commission*, 128 S.Ct. 2759 (2008), at 37 ("a plaintiff must demonstrate standing separately for each form of relief sought") (*quoting DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006)), available at 2008 WL 742921.

might herself have been injured by the dismissal of another worker (e.g., incurring increased health insurance premiums to cover her unemployed husband); if so she would have standing to seek redress payable to herself for her own injuries. But that would not mean that such a plaintiff would *also* have standing to seek an award of damages or backpay payable to her spouse.

The government suggests that Title VII itself provides Regalado with the Article III standing (which she would otherwise lack) to maintain an action seeking monetary relief payable to Thompson. It relies entirely on a single sentence in a footnote in *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." (U.S.Br. 12). But this Court long ago made clear that this passage means only that Congress can expand the *types* of injuries actually sustained by a plaintiff which the law will recognize and redress, not that Congress can confer Article III standing to provide a form of redress that does not remedy any injury to the plaintiff.

> Both of the cases used by *Linda R.S.* as an illustration of that principle involved Congress' elevating to the status of legally cognizable injuries concrete, *de facto*, injuries that were previously inadequate in law (namely, injury to an individual's personal interest in living in a racially integrated

> community, see *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 208-12 (1972), and injury to a company's interest in marketing is product free from competition, see *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 6 (1968)). As we said in *Sierra Club* [*v. Morton*, 405 U.S. 727 (1972)], "[Statutory] broadening [ ]of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must have suffered an injury." 405 U.S. at 738.

Lujan v. Defenders of Wildlife, 504 U.S. 555, 578 (1992). Under *Linda R.S.* Congress could provide Regalado a damage remedy for any injuries that she herself suffered when Thompson was fired, but it could not accord her Article III standing to seek an order providing monetary redress to Thompson for injuries suffered by Thompson himself.

An unenforceable prohibition against third party reprisals creates the same gap in Title VII as the Third and Eighth Circuit rule that such reprisals are lawful. This Court's well established standing decisions, many of them adopted at the behest of the United States itself, manifestly preclude the lower courts from entertaining the sort of gerry-rigged claim hypothesized by the government's brief. This is not an issue that would benefit from percolation in the lower courts; those courts have no authority to disregard the constitutionally mandated standing

requirements delineated by the decisions of this Court.

II. THE DECISION BELOW PRESENTS AN IMPORTANT CONFLICT REGARDING TITLE VII

(1) The government suggests that the differences among the lower court decisions in this area are mere "analytical deviations on route to the same bottom-line result." (U.S.Br. 7). That is not correct. Those decisions actually present conflicting interpretations of three different provisions of federal law, each with distinct applications and consequences.

First, the Third and Eighth Circuits hold that under section 704(a) reprisals against third parties are lawful. (U.S.Br. 7) In those circuits no plaintiff – not even the EEOC or Department of Justice – could sue to enjoin or redress such reprisals. The government insists, on the other hand, that the Sixth Circuit decision in the instant case holds – to the contrary – that reprisals of that sort do violate section 704(a). (U.S.Br. 6, 11, 13). We noted in the petition that First and Eleventh Circuits have held that the identically worded provisions of OSHA and the Equal Pay Act do forbid third party reprisals. (Pet. 28). The United States does not contend that the substantive language of those two statutes is in any way distinguishable from the terms of Title VII, and does not suggest that under current law in the Third and Eighth Circuits either the Department of Labor or

the EEOC could enforce any of these statutes to prevent or redress third party reprisals. (U.S.Br. 9-10 and 10 n.5).

Second, the Fifth Circuit insists that individuals injured by violations of other employees are not "persons aggrieved," and thus cannot meet the requirements of prudential standing principles. *Holt v. JTM Indus., Inc.*, 151 F.3d 813, 819 (5th Cir.1996). If that is correct, it would bar relief in a wide range of cases other than third party reprisals. (See, e.g., *Anjelino v. The New York Times*, 299 F.3d 73 (3d Cir.2000) (employer suspended hiring whenever the most senior applicant was a woman, thus denying jobs as well to all less senior men)). As we noted in the petition, four circuits have held to the contrary that the statutory authority for a "person aggrieved" to file suit does confer standing to sue on individuals whose own rights were not violated. (Pet. 35).

Third, the Sixth Circuit in the instant case insists that section 706(f)(1) (which applies to a "person ... aggrieved") does not create cause of action. That rule would mean that Title VII claimants generally, not just plaintiffs in third party reprisal cases, would be governed by the restrictive standards regarding implied causes of action, which the Sixth Circuit applied in this case. As we explain below, six circuits insist, to the contrary, that section 706(f)(1) does create a cause of action for any "person ... aggrieved."

(2) The government agrees that the Sixth Circuit rejected Thompson's claim on the ground that section 706 does not provide a cause of action to a "person ... aggrieved." (U.S.Br. 3, 15-16). But having identified the existence vel non of a cause of action under section 706 as the dispositive issue in the court below, the United States simply fails to address whether, as we asserted in the petition, there is an inter-circuit conflict on that very issue. (Pet. 37).

The en banc majority acknowledged that Thompson is a "person aggrieved" within the terms of section 706. Thus *if* section 706 itself provides a cause of action for "person[s] aggrieved," Thompson would indeed have a cause of action. As the United States explains, however, the majority below believed that whether a plaintiff has a cause of action for a violation of Title VII turns not on section 706, but on cases such as *Davis v. Passman*, 442 U.S. 228 (1979), regarding implied causes of action. (Pet. App. 9a; see U.S.Br. 15-16). In the court below Judges Rogers and White insisted, to the contrary, that who "may sue for Title VII violations" is expressly governed by section 706, which authorizes such suits by "person[s] aggrieved." (Pet. App. 30a (concurring opinion); see Pet. App. 58a (dissenting opinion)).

The government correctly agrees with Judges Rogers and White, insisting – contrary to the view of the majority below – that section 706 itself expressly provides a cause of action.

> Congress ... in [section 706(f)(1)] ... provided a cause of action for a 'person claiming to be aggrieved' by a violation of the statute.... Since the court of appeals held that petitioner was in fact 'aggrieved' within the meaning of this provision, ... it should have concluded that his suit could proceed.

(U.S.Br. 16).

The very interpretation of section 706 advanced by the Solicitor General – as inconsistent with the decision below – has been expressly adopted by six other courts of appeals, which hold that section 706 does indeed provide a cause of action for violations of Title VII. Although we expressly pointed to that line of decisions and conflict in the petition, the United States inexplicably does not mention any of these circuit court decisions which agree with its construction of section 706. The Solicitor General takes no position at all as to whether there is an inter-circuit conflict on the specific legal issue which the government insists was the basis of the Sixth Circuit decision. The brief for the United States simply is not helpful to the Court in determining whether there is such a conflict about whether section 706 provides a cause of action to a "person ... aggrieved."

Such a conflict clearly exists. In *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268 (D.C.Cir.1994), the District of Columbia Circuit adopted precisely the view advanced by the United States, and by Judges

White and Rogers in their separate opinions, that section 706 provides a cause of action to any "person aggrieved" by a violation of Title VII.

> Congress specifically permitted any "person claiming to be aggrieved" by an unlawful employment practice to file suit.... See 42 U.S.C. § 20000e-(5)(f)(1). Accordingly, if the Council can back up its allegations of Article III standing with actual proof, it has a cause of action under Title VII.

28 F.3d at 1278.

Similarly, the Seventh Circuit holds that section 706 authorizes lawsuits by any person claiming to be aggrieved by a violation of Title VII. "The statute ... expressly permits ... a civil action in court 'by the person claiming to be aggrieved,' § 2000e-5(f)(1)." *Kyles v. J.K. Guardian Security Services, Inc.*, 222 F.3d 389, 295 (7th Cir.2000); see *Leibovitz v. New York City Transit Authority*, 252 F.3d 179, 185 (2d Cir.2001) ("Title VII provides a private right of action for a 'person claiming to be aggrieved....' 42 U.S.C. § 2000e-5(f)(1)"); *Childress v. City of Richmond, Va.*, 120 F.3d 476, 480 (4th Cir.1997) ("Congress conferred a private right of action on 'the person claiming to be aggrieved ... ' 42 U.S.C. § 2000e-5(f)(1)"). The Fifth[4] and Ninth

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[4] *EEOC v. Louisville & Nashville R.R. Co.*, 505 F.2d 610, 613 (5th Cir.1984); *International Brotherhood of Elec. Workers v. Western Electric Co.*, 661 F.2d 514, 517 n.5 (5th Cir.1981); *Donovan v. University of Texas at El Paso*, 643 F.2d 1201, 1205 (5th Cir.1981); *Turner v. Texas Instruments, Inc.*, 556 F.2d 1349, 1351 (5th Cir.1977).

Circuits[5] also have repeatedly held that section 706(f)(1) creates a "cause of action" or "right of action."

Six of the seven circuits to address this issue agree with the position of the Solicitor General that the holding of the Sixth Circuit is incorrect. Certiorari should be granted to resolve this conflict.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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[5] *Etemad v. United States*, 1993 WL 114832 at *1 (9th Cir.); *Wallace v. Dunn Constr. Co.*, 62 F.3d 374, 379 (9th Cir.1991); *Ward v. EEOC*, 719 F.2d 311, 314 (9th Cir.1983).

AMICUS CURIAE BRIEF

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In the Supreme Court of the United States

ERIC L. THOMPSON, PETITIONER

v.

NORTH AMERICAN STAINLESS, LP

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the anti-retaliation provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-3(a), prohibits an employer from responding to an employee's protected activity by dismissing a closely associated employee.

2. Whether that closely associated employee may sue the employer for retaliation.

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In the Supreme Court of the United States

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Title VII of the Civil Rights Act of 1964 prohibits an employer from retaliating against an employee because she engaged in protected activity, such as filing a complaint with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. 2000e-3(a). The Attorney General is responsible for enforcing Title VII against public employers, and the EEOC enforces Title VII against private employers. 42 U.S.C. 2000e-5(f)(1). In addition, Title VII applies to the United States in its capacity as the nation's largest employer. 42 U.S.C. 2000e-16. The United States thus has a strong interest in the proper interpretation of Title VII. The EEOC participated as amicus curiae in this case in the court of

appeals, and the United States filed a brief at the invitation of the Court at the petition stage of this case.

STATEMENT

1. Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate against employees on a number of bases, including their sex. 42 U.S.C. 2000e-2(a)(1). The statute also makes it an unlawful employment practice for an employer "to discriminate against any of his employees * * * because [the employee] has opposed any practice made an unlawful employment practice by [Title VII] * * * or because he has made a charge [with the EEOC] * * * under [Title VII]." 42 U.S.C. 2000e-3(a). A separate provision of Title VII provides that a "person claiming to be aggrieved" may file a charge alleging that an employer "has engaged in an unlawful employment practice." 42 U.S.C. 2000e-5(b). Such "aggrieved" person may then intervene in a civil action instituted by the EEOC or, if the EEOC chooses not to institute such an action, file a suit himself. 42 U.S.C. 2000e-5(f)(1).

2. Miriam Regalado and petitioner both worked as quality control engineers at a stainless steel manufacturing plant in Kentucky owned by respondent. Pet. App. 3a; Thompson Dep. 15, 38. They began dating while employed there and were engaged to be married. Pet. App. 3a. "[T]heir relationship was common knowledge at North American Stainless." *Ibid.*

In September 2002, Regalado filed a charge with the EEOC alleging that her supervisors had discriminated against her based on her gender. Pet. App. 3a. The EEOC notified respondent of this charge on February 13, 2003. *Ibid.* On March 7, 2003, respondent terminated petitioner. *Ibid.*

3. Petitioner filed a charge with the EEOC alleging that respondent had terminated him solely because of his fiancée's protected activity and that this conduct violated the anti-retaliation provision of Title VII. The EEOC investigated and concluded that there was "reasonable cause to believe that [respondent] violated Title VII." Pet. App. 4a.

After the EEOC issued a right-to-sue letter, petitioner filed suit in district court. The district court granted respondent's motion for summary judgment. It concluded that "under its plain language, the statute does not permit a retaliation claim by a plaintiff who did not himself engage in protected activity." Pet. App. 104a.

4. The court of appeals initially reversed, see Pet. App. 64a-90a, but then granted respondent's petition for rehearing en banc and affirmed the district court's grant of summary judgment for respondent. See *id.* at 1a-63a.

a. The en banc court concluded that "the plain and unambiguous statutory text" of 42 U.S.C. 2000e-3(a) limits "the authorized class of claimants * * * to persons who have personally engaged in protected activity." Pet. App. 2a.

The court of appeals acknowledged that Title VII "empowers a 'person claiming to be aggrieved' to bring a civil action to enforce the prohibitions against unlawful employment practices contained in the substantive provisions of the statute." Pet. App. 9a n.1 (quoting 42 U.S.C. 2000e-5(f)(1)). It also noted that it had previously interpreted this provision to "show[ ] a congressional intent to define standing under Title VII as broadly as is permitted by Article III of the Constitution." *Id.* at 10a n.1. Petitioner was an "aggrieved person" under this standard, the court of appeals explained, since

"(1) he suffered an injury-in-fact (termination of his employment), (2) as a result of [respondent's] putatively illegal conduct, and (3) it is possible, instead of merely speculative, that his injury is redressable." *Ibid.*

The court of appeals nonetheless held that petitioner did not have a "cause of action" under 42 U.S.C. 2000e-3(a). Pet. App. 8a. In its view, petitioner "is not included in the class of persons for whom Congress created a retaliation cause of action because he personally did not oppose an unlawful employment practice." *Ibid.* The court said that its "interpretation does not undermine the anti-retaliation provision's purpose because retaliation is still actionable, but only in a suit by a primary actor who engaged in protected activity and not by a passive bystander." *Id.* at 28a-29a. The court also noted that "[a]ll of the parties in this case agreed at oral argument that if Miriam Regalado believed that she was the intended target of retaliation for engaging in her protected activity, she could have filed a retaliation action pursuant to [Section 2000e-3(a)] and * * * defendant's termination of [petitioner] potentially could be deemed an 'adverse employment action' against her." *Id.* at 29a n.10 (citing *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53 (2006)).

b. Judge Rogers concurred in the result. Pet. App. 29a-33a. In his view, 42 U.S.C. 2000e-3(a) "dictates what practices amount to unlawful retaliation, not who may sue." Pet. App. 30a. He concluded that taking adverse action against someone closely associated with an employee in retaliation for the employee's filing an EEOC charge constituted unlawful retaliation against the complaining employee. *Id.* at 29a-30a. Nonetheless, Judge Rogers thought petitioner's suit failed because petitioner was not a "person aggrieved" within the meaning

of Section 2000e-5(f). "The intended beneficiaries of the anti-retaliation provision of [Section] 2000e-3(a) are obviously the persons retaliated against, not persons who are incidentally hurt by the retaliation." *Id.* at 32a. Accordingly, Judge Rogers concluded that Regalado, not petitioner, should have brought the claim in this case. *Id.* at 32a-33a.

c. In one of three dissenting opinions, Judge White agreed with Judge Rogers that 42 U.S.C. 2000e-3(a) "addresses *what* is forbidden, rather than *who* is protected" or "who may and may not maintain a cause of action." Pet. App. 56a-57a (emphasis in original). "[O]nce the employer's conduct is found to violate" that section, Judge White concluded, "there is no reason to look back to [it] to determine who may maintain an action based on the violation." *Id.* at 58a. Rather, the question whether petitioner could sue turned solely on whether he was "aggrieved by an unlawful employment practice" within the meaning of Title VII's remedial provisions. *Ibid.* In Judge White's view, petitioner clearly was "aggrieved" because he had lost his job as a direct result of the unlawful employment practice he challenged. *Id.* at 58a-59a.

Judge Moore dissented because, in her view, the majority's interpretation of Title VII "defeats the Congressional purpose" and contradicts this Court's repeated holdings that the statute's anti-retaliation provision should be interpreted broadly enough to ensure that its purpose is satisfied. Pet. App. 41a.[1]

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[1] Judge Martin dissented on the further ground that petitioner should be afforded an opportunity to prove that he personally "opposed" sex discrimination and respondent fired him for that reason. Pet. App. 33a-38a. Petitioner did not seek certiorari on that ground.

SUMMARY OF ARGUMENT

Title VII's anti-retaliation provision prohibits an employer from firing an employee because someone close to him filed an EEOC complaint. When an employer engages in this form of unlawful retaliation, the dismissed employee is "aggrieved" by an unlawful employment practice and thus has a cause of action under Title VII.

1. Title VII makes it an "unlawful employment practice[]" to "discriminate" against an employee for filing a complaint with the EEOC or engaging in other protected activity. 42 U.S.C. 2000e-3(a). In order to achieve its purpose of assuring that employees have "unfettered access to statutory remedial mechanisms," Congress intended this broadly worded provision to "deter the many forms that effective retaliation can take." *Burlington N. & Sante Fe Ry.* v. *White*, 548 U.S. 53, 64 (2006) (citation omitted). Accordingly, this Court has interpreted the statute's prohibition on retaliation to cover any action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks and citations omitted).

As every member of the en banc court of appeals agreed, firing an employee's spouse or fiancé because of the employee's EEOC complaint is unlawful retaliation against the complaining employee. The prospect that such a fate could befall a spouse, family member, or other closely associated person well might dissuade a reasonable employee from exercising her statutory right to complain about discrimination.

2. Title VII provides an express cause of action to a "person * * * aggrieved" by an employer's unlawful employment practice. See 42 U.S.C. 2000e-5(b) and (f).

This cause of action appears in Title VII's detailed remedial provisions, which are distinct from its substantive prohibitions on employer conduct.

This Court has held that statutory cause of action provisions providing remedies to those "aggrieved" by unlawful actions are meant to be "broad and inclusive." *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972). As the court of appeals correctly found, petitioner was "aggrieved" within the meaning of Title VII by his own dismissal. Petitioner lost his job as the direct and intentional result of his employer's unlawful actions, and Title VII was enacted "to make" such employees "whole." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975).

The general prudential bar against asserting the legal interests of others does not preclude petitioner's claim. Congress has the power to define statutory causes of action and, in exercising such power, may decide whether to incorporate or modify default prudential standing rules. When Congress provided a cause of action to a "person"—as opposed to simply an employee—"aggrieved" by an unlawful employment practice, it intended to broadly provide a remedy to injured parties and thus relaxed prudential standing requirements. The fact that respondent's motivation in dismissing petitioner was to retaliate against his fiancée does not make him any less "aggrieved" by his own termination. He was not a mere bystander or derivative victim. He suffered direct and intended injury at the hands of respondent.

The court of appeals' conclusion that petitioner, although aggrieved, had no "cause of action" under Title VII was wrong. In reaching this determination, the court mistakenly examined the statute's prohibition on

retaliation in isolation and attempted to divine whether Congress would have wanted plaintiffs like petitioner to be able to enforce that provision. This exercise was unnecessary, since Title VII's remedial provisions provide an express textual answer to the question the court of appeals asked: A "person * * * aggrieved" by an unlawful employment practice has a cause of action to challenge it. 42 U.S.C. 2000e-5(f)(1).

Title VII's plain text controls both questions presented and, moreover, is consistent both with the EEOC's longstanding interpretation of the relevant law and with sound enforcement policy. For more than 30 years, the EEOC has said that it is unlawful to dismiss an employee's family member for the employee's protected activity. Interpreting Title VII's anti-retaliation provision to permit such a pernicious form of retribution would undermine the statutory scheme, which depends on employees' willingness to file complaints. Moreover, the EEOC has also consistently taken the position that the dismissed employee in such cases has a cause of action under Title VII. That position also best effectuates the statutory scheme, as it is the dismissed employee who has the greatest economic interest in suing and is the most likely candidate to vindicate the statutory interest in a workplace free of unlawful retaliation.

ARGUMENT

I. TITLE VII BARS AN EMPLOYER FROM RETALIATING AGAINST AN EMPLOYEE WHO ENGAGES IN PROTECTED ACTIVITY BY DISMISSING THE EMPLOYEE'S RELATIVE OR OTHER CLOSE ASSOCIATE

A reasonable employee would be less likely to file an EEOC charge if she knew that doing so would lead her employer to fire her fiancé. As all the judges on the en

banc court of appeals agreed, such action by an employer thus constitutes unlawful retaliation. See *Burlington N. & Sante Fe Ry.* v. *White*, 548 U.S. 53, 68 (2006) (*Burlington Northern*); see also Pet. App. 29a n.10; *id.* at 53a (White, J., dissenting).

A. Title VII's Prohibition On Retaliation Bars All Materially Adverse Actions Taken Against Employees Because Of Their Protected Activity

Title VII makes it "an unlawful employment practice" for an employer "to discriminate against any of his employees" because of that employee's protected activity. 42 U.S.C. 2000e-3(a). In *Burlington Northern*, this Court rejected a reading of this provision that would have prohibited only retaliation that took the form of changes to the terms or conditions of employment. 548 U.S. at 60, 64. The Court concluded that such a crabbed interpretation of the anti-retaliation provision's scope was inconsistent with both its text and the role it plays in the statutory scheme.

As the Court in *Burlington Northern* noted, Title VII's central prohibition bars employers from "discriminat[ing] against any individual *with respect to his compensation, terms, conditions, or privileges of employment*, because of such individual's race, color, religion, sex, or national origin." 548 U.S. at 62 (quoting 42 U.S.C. 2000e-2(a)(1)) (emphasis in original). "The italicized words in the substantive provision * * * explicitly limit the scope of that provision to actions that affect employment or alter the conditions of the workplace." *Ibid.* As the Court emphasized, however, "[n]o such limiting words appear in the antiretaliation provision." *Ibid.* That portion of the statute simply makes it an unlawful employment practice "for an employer *to*

discriminate against any of his employees" because of their protected activity. *Ibid.* (quoting 42 U.S.C. 2000e-3(a))(emphasis in original); see *id.* at 59 ("No one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals."). The Court concluded that "Congress intended its different words to make a legal difference." *Id.* at 62-63.

The Court in *Burlington Northern* also noted that the distinct language of the two provisions reflected their different purposes. While the substantive provision "seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status," the "antiretaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees." *Burlington Northern*, 548 U.S. at 63; see *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 346 (1997) (anti-retaliation provision must be interpreted consistent with its purpose of ensuring that employees have "unfettered access to statutory remedial mechanisms").

The Court further explained that the anti-retaliation provision's purpose could not be achieved "by focusing only upon employer actions and harms that concern employment and the workplace" because "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace." *Burlington Northern*, 548 U.S. at 63 (emphasis in original); see also *id.* at 64 ("A provision limited to employment-related actions would not deter the many forms that effective retaliation can take.").

The Court stressed, however, that the "antiretaliation provision protects an individual not from all retaliation, but from retaliation that produces an injury or harm." *Burlington Northern*, 548 U.S. at 67. The Court thus held that the statute prohibits any "action" that a "reasonable employee would have found * * * materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Id.* at 68 (internal quotation marks and citation omitted).

B. Dismissal Of A Complaining Employee's Fiancé Is Materially Adverse And Thus Constitutes Unlawful Retaliation

Petitioner's dismissal constituted retaliation against Regalado under the *Burlington Northern* standard: it was a "materially adverse" action that "might * * * dissuade[] a reasonable worker from making or supporting a charge of discrimination." 548 U.S. at 68 (internal quotation marks and citation omitted).

1. As a number of courts have recognized, retaliation against an employee's family member or other close associate can be a particularly effective form of retaliation. "To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB* v. *Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987) (Posner, J.); accord *Tasty Baking Co.* v. *NLRB*, 254 F.3d 114, 128 (D.C. Cir. 2001); see *Fogleman* v. *Mercy Hosp., Inc.*, 283 F.3d 561, 568-569 (3d Cir.) ("There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate antidiscrimination proceedings will deter employees from exercising their protected rights."), cert. denied,

537 U.S. 824 (2002). Indeed, this Court in *Burlington Northern* cited as an example of unlawful retaliation a case involving the Federal Bureau of Investigation's alleged "refusal, contrary to policy, to investigate death threats a federal prisoner made against [an agent who had engaged in protected activity] *and his wife*." 548 U.S. at 63-64 (quoting *Rochon* v. *Gonzales*, 438 F.3d 1211, 1213 (D.C. Cir. 2006)) (emphasis added). The FBI's alleged refusal to investigate the death threats in that case would have been no less retaliatory had the threats been made against the agent's wife alone.

Much like the interpretation of Title VII's anti-retaliation provision the Court rejected in *Burlington Northern*, an interpretation that categorically excluded claims of third-party retaliation would fail to reach "many forms that effective retaliation can take." 548 U.S. at 64. Such an interpretation would thus "fail to fully achieve the antiretaliation provision's 'primary purpose,' namely, '[m]aintaining unfettered access to statutory remedial mechanisms." *Ibid.* (quoting *Robinson*, 519 U.S. at 346).

2. The EEOC has long held the view that Title VII's anti-retaliation provision prohibits the retaliatory termination of a complaining party's relative or other close associate. The *EEOC Compliance Manual* provides that "[t]he retaliation provision[] of Title VII * * * prohibit[s] retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage or prevent the person from pursuing those rights." *EEOC Compliance Manual* § 8-II(C)(3) (1998); accord *id.* § 8-II(B)(3)(c). The agency has espoused this view for more than 30 years. See, *e.g.*, EEOC Decision No. 77-34, 1977 WL 5345 (1977) ("[W]here it can be shown that an employer

discriminated against an individual because he or she was related to a person who filed a charge, it is clear that the employer's intent is to retaliate against the person who filed the charge."). Such statements, though not controlling, "reflect a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 399 (2008) (internal quotation marks and citations omitted); see *id.* at 399, 403 (*EEOC Compliance Manual*'s interpretation of Title VII entitled to *Skidmore* deference and will be upheld when the agency has "cho[sen] among reasonable alternatives" in interpreting the statute and "has applied its position with consistency"). The EEOC's interpretation of the statute provides additional support for the conclusion that petitioner's dismissal constituted unlawful retaliation against Regalado for the exercise of her statutory rights.

3. Despite the EEOC's longstanding position, respondent predicts the onset of "chaos in both the courts and the workplace" regarding "what types of relationships should be entitled to protection" if this Court were to adopt it. Br. in Opp. 31. But under *Burlington Northern*, the question is not whether a particular "type[] of relationship[]" is categorically "entitled to protection," *ibid.*, but instead whether an employer's action—in this case, targeting the particular relative or close associate at issue—"well might have dissuaded a reasonable worker from making or supporting a charge of discrimination," 548 U.S. at 68 (internal quotation marks and citation omitted). That inquiry is necessarily context-specific, since "the significance of any given act of retaliation will often depend upon the particular circumstances." *Id.* at 69; see *ibid.* (explaining that "[a] sched-

ule change in an employee's work schedule," for example, "may make little difference to many workers, but may matter enormously to a young mother with school-age children").

In *Burlington Northern*, the Court carefully examined the record before it to determine whether the evidence was sufficient to support a jury finding that an internal job reassignment "from forklift duty to standard track laborer tasks" and a "37-day suspension without pay" were materially adverse. 548 U.S. at 70-73. In so doing, the Court explained that "reassignment of job duties is not automatically actionable," and that the material adversity "depends upon the circumstances of the particular case, and 'should be judged from the perspective of a reasonable person in the plaintiff's position.'" *Id.* at 71 (quoting *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998)).

Claims of third-party retaliation are subject to the same kind of examination. The closeness of the relationship will naturally play an important role in the inquiry: dismissal of a passing acquaintance is likely to bear far less significance to an employee who has engaged in protected activities than, for example, the dismissal of her fiancé. See Pet. App. 60a (White, J., dissenting) ("Where the relationship between the two employees is more attenuated, it will be more difficult to prove [an employer's] unlawful motivation."); see also *Millstein* v. *Henske*, 722 A.2d 850, 855 (D.C. 1999) ("We decline [plaintiff's] invitation to adopt a third-party reprisal theory [under the District of Columbia Human Rights Act] embracing so attenuated a relationship."). There is no basis for respondent's concern that the courts will be unable to apply the *Burlington Northern* standard to this form of retaliation, just as they do to every other.

II. PETITIONER WAS "AGGRIEVED" BY RESPONDENT'S UNLAWFUL EMPLOYMENT PRACTICE AND THUS HAS A CAUSE OF ACTION TO CHALLENGE IT

Petitioner has a cause of action under Title VII to challenge respondent's unlawful retaliation because he was "aggrieved" by his own dismissal. 42 U.S.C. 2000e-5(f). Petitioner is thus entitled to seek a remedy under Title VII.

A. Title VII Provides A Cause Of Action To A Person "Aggrieved" By An Unlawful Employment Practice

1. Title VII contains separate provisions proscribing unlawful employment practices on the one hand and governing enforcement on the other. In 42 U.S.C. 2000e-2, Congress made it "an unlawful employment practice" to, among other things, "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). In 42 U.S.C. 2000e-3 (titled "Other unlawful employment practices"), Congress prohibited retaliation. Both of those provisions proscribe certain actions by employers. Neither provision specifies how those proscriptions are to be enforced. See Pet. App. 56a (White, J., dissenting).

Congress addressed enforcement of these prohibitions in a separate portion of the statute: 42 U.S.C. 2000e-5 (titled "Enforcement provisions"). That part of Title VII makes clear that a "person" who is "aggrieved" by an unlawful employment practice may challenge it. A "person claiming to be aggrieved" may file a charge with the EEOC alleging an unlawful employment practice. 42 U.S.C. 2000e-5(b). If the EEOC (in the case of a private employer) or the Attorney General

(in the case of a public employer) later files suit, "[t]he person or persons aggrieved shall have the right to intervene." 42 U.S.C. 2000e-5(f)(1). And if neither the EEOC nor the Attorney General files suit, "the person claiming to be aggrieved" may bring his own civil action. *Ibid.*

B. Petitioner Was "Aggrieved" Within The Meaning Of Title VII

Petitioner was "aggrieved" within the meaning of Title VII's remedial provisions. He lost his job as the direct result of an unlawful employment practice—namely, unlawful retaliation against his fiancée. That injury is sufficient to provide him with a cause of action under the statute.

1. Congress's choice of the term "aggrieved" signals its intention broadly to permit individuals injured by unlawful employment practices to challenge those practices in court. See, *e.g.*, *FEC* v. *Akins*, 524 U.S. 11, 19 (1998); see also *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (calling similar cause of action provision in the Fair Housing Act "broad and inclusive"). Congress chose this broad term as a foundational element of a statutory remedial scheme whose purpose is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). And while the portion of the anti-retaliation provision applicable to employers bars retaliation against "employees or applicants," 42 U.S.C. 2000e-3(a), Title VII provides a cause of action broadly to a "*person* claiming to be aggrieved" by such an act of retaliation (or other violation of the statute), 42 U.S.C. 2000e-5(f)(1) (emphasis added).

In this case, petitioner's injury renders him "aggrieved" within the meaning of Section 2000e-5(f). The employer action he seeks to challenge was his own termination—a direct, palpable injury consciously caused by respondent. An employee whose dismissal was itself an unlawful employment practice is "aggrieved" under a statute intended to prevent and remedy exactly that type of harm. Cf. *Albemarle Paper Co.*, 422 U.S. at 421 ("[T]he scope of relief" provided in Title VII "is intended to make the victims of unlawful discrimination whole, and * * * the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.") (quoting 118 Cong. Rec. 7168 (1972)).

2. Although the majority of the court of appeals did not dispute that petitioner has standing as an "aggrieved" person, see Pet. App. 10a n.1, the concurring judge concluded that petitioner was not entitled to challenge his own retaliatory dismissal because he was not the person against whom respondent was retaliating, see *id.* at 31a-32a (Rogers, J., concurring). That conclusion is incorrect.

a. "[U]nlike their constitutional counterparts," prudential standing requirements, such as the rule limiting third-party standing, "can be modified or abrogated by Congress." *Bennett* v. *Spear*, 520 U.S. 154, 162 (1997); see *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975) (same). As a general matter, this Court has made clear that Congress's use of the term "aggrieved" in a statutory cause of action provision signals Congress's intent to exercise

this authority over prudential standing rules by relaxing the normal limitation on "rest[ing] [a] claim to relief on the legal rights or interests of third parties," *Id.* at 499; see *Akins*, 524 U.S. at 19 ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested.").

The Court has on several occasions interpreted statutory causes of action using words such as "aggrieved" to permit all plaintiffs with Article III standing to bring suit. See, *e.g.*, *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 103 n.9 (1979) ("[A]s long as the [Fair Housing Act] plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by [the statute's substantive provision], but whether [plaintiffs] were genuinely injured by conduct that violates *someone's* * * * rights" under the statute.) (emphasis in original); *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 328-329 (1999) (language permitting suit by a "person aggrieved by" certain Census methodology conferred standing as broadly as permitted by Article III); *Bennett*, 520 U.S. at 165-166 (giving similar interpretation to provision giving "any person" the right to sue under environmental statute).

In *Trafficante*, this Court interpreted the cause of action provision of the Fair Housing Act (FHA), which authorized suit by "[a]ny person who claims to have been injured by a discriminatory housing practice * * * (hereafter 'person aggrieved')," to permit tenants of a housing complex, one of whom was white, to chal-

lenge racial discrimination directed against nonwhite rental applicants. 409 U.S. at 206 n.1 (quoting 42 U.S.C. 3610(a) (1970)).[2] In reaching that conclusion, the Court analogized the FHA provision to Title VII's similar enforcement provision and favorably cited a court of appeals decision holding that Congress had broadly expanded standing beyond prudential limits in Title VII. *Id.* at 209 (citing *Hackett* v. *McGuire Bros.*, 445 F.2d 442 (3d Cir. 1971)).

As numerous courts of appeals have held, *Trafficante*'s analogy to Title VII and the two statutes' similar remedial language suggest that *Trafficante*'s analysis of the FHA applies equally to Title VII. See *Kyles* v. *J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295 (7th Cir. 2000) (collecting cases). That analysis makes clear that petitioner—who clearly has Article III standing, see Pet. App. 10a n.1—is not barred from challenging his own dismissal merely because he was not the intended target of respondent's unlawful retaliation.

b. Contrary to the concurring judge's opinion, to acknowledge that petitioner was "aggrieved" by his own dismissal will not lead to suits by plaintiffs with only speculative and derivative injuries, such as "someone interested in the financial health of a company" seeking to "challenge the firing of a particularly productive employee" or a suit by a "dismissed employee's creditor." Pet. App. 32a. For one thing, it is not clear that such hypothetical plaintiffs would have Article III standing. A shareholder of a company has a financial interest in the company's success, not the company's employment

[2] The FHA's language since has been amended to further conform with Title VII's. It now provides that "[a]n aggrieved person" may file an administrative complaint, 42 U.S.C. 3610(a)(1)(A)(i), or a civil action, 42 U.S.C. 3613(a)(1)(A).

of any particular person. The employment of an individual is far too attenuated from a company's success—which is dependent on any number of other factors—for a shareholder's losses to be "fairly traceable" to the company's firing of that individual, let alone its commission of a Title VII violation (as opposed to the dismissal of the individual for another, lawful purpose). *Allen* v. *Wright*, 468 U.S. 737, 751 (1984); see *Anjelino* v. *New York Times Co.*, 200 F.3d 73, 92 (3d Cir. 2000) ("indirect victims" of Title VII violation must demonstrate injuries that are "fairly traceable" to the violation). Similarly, a dismissed employee's creditor would have no standing to seek the employee's reinstatement because the creditor's injury—the nonpayment of a debt by the employee—could be redressed only by the independent decision of the employee to pay, not by the employee's reinstatement. See *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976) (Article III does not confer jurisdiction over "injury that results from the independent action of some third party not before the court.").

In any event, such hypothetical plaintiffs bear little resemblance to petitioner, who was not merely "a passive bystander," Pet. App. 29a, nor one "incidentally hurt by the retaliation," *id.* at 32a (Rogers, J., concurring). See *id.* at 62a (White, J., dissenting) ("While an overly broad construction of 'aggrieved' might be problematic if taken to the extreme, one need not go down that path here because [petitioner] lost his job and it is difficult to conceive of a potential plaintiff being more aggrieved."). Even were it appropriate to read the term "aggrieved" in a more limited manner than this Court's cases have suggested, see *id.* at 32a (Rogers, J., concurring), any such limitation could not plausibly preclude

standing for a plaintiff seeking to challenge his own dismissal.

The Court rejected just such a constricted reading of a broad statutory cause of action provision in *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982) (*Blue Shield*), an antitrust case in which the defendant directly harmed the plaintiff-customer as part of its illegal plan to injure its competitors. The health insurer-defendant in that case freely covered psychotherapy provided by psychiatrists but covered psychotherapy provided by psychologists only with significant limitations. *Id.* at 468. The plaintiff was a subscriber to the health insurer's plan whose claims for treatment by a psychologist were denied. *Ibid.* She brought a claim under Section 1 of the Sherman Act, 15 U.S.C. 1, alleging that the insurer's practice was part of an "unlawful conspiracy * * * to exclude and boycott clinical psychologists" and thus limit competition to physicians. *Blue Shield*, 457 U.S. at 469-470. She further contended that she was entitled to maintain suit under Section 4 of the Clayton Act as "[a] person * * * injured in [her] business or property by reason of anything forbidden in the antitrust laws." *Id.* at 470 & n.6 (quoting 15 U.S.C. 15).

The insurer contended that "because the alleged conspiracy was directed by its protagonists at psychologists, and not at subscribers to group health plans, only psychologists might maintain suit." *Blue Shield*, 457 U.S. at 478. The Court concluded that "[t]his argument [could] be quickly disposed of." *Ibid.* It observed that the "unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not to cabin [Section] 4 in ways that will defeat its broad remedial objective." *Id.* at 477.

The Court found no need to decide whether certain courts of appeals had correctly limited the Section 4 cause of action to plaintiffs who were within the "target area" of the alleged conspiracy, notwithstanding that the statutory text contained no such limitation, because the plaintiff was well within that area. *Blue Shield*, 457 U.S. at 476 n.12. The Court explained that "[d]enying reimbursement to subscribers of the cost of treatment was the very means by which it is alleged that [the insurer] sought to achieve its illegal end," *id.* at 479. "The harm to [plaintiff] and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy." *Ibid.* The plaintiff's injury thus fell "squarely within the area of congressional concern" even though she was not a competitor of the conspirators, because her injury "was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market." *Id.* at 484.

Here too, respondent's termination of petitioner was "the very means by which" respondent "sought to achieve its illegal ends." *Blue Shield*, 457 U.S. at 479. "The harm" to petitioner "was clearly foreseeable; indeed, it was a necessary step in effecting" the retaliation against Regalado. *Ibid.* Even though petitioner did not himself engage in protected activity, "the injury [he] suffered was inextricably intertwined with the injury [respondent] sought to inflict" on Regalado. *Id.* at 484. Petitioner requests relief that is not at all "speculative, abstract, or impractical," and that creates "not the slightest possibility of a duplicative exaction" from respondent. *Id.* at 475 & n.11. Like the plaintiff in *Blue Shield*, petitioner should be able to pursue his claim.

c. Finally, the core purpose behind the prudential limitation on third-party standing is not implicated by petitioner's claim. This Court has explained that "[w]ithout such limitation[ ]" on a plaintiff's ability to assert the rights of absent parties, "the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." *Warth*, 422 U.S. at 500. Petitioner does not ask for resolution of any abstract question. Rather, the harm that he alleges is not one shared by anyone else (rendering this case far different from cases such as *Warth*). Petitioner asserts a concrete challenge to his own dismissal and seeks a readily ascertainable remedy for it; prudential standing concerns are thus no barrier in light of Congress's decision to permit an aggrieved person to sue.

C. The Court Of Appeals Wrongly Imposed An Extra-Statutory "Cause Of Action" Requirement On Retaliation Claims

The court of appeals' (correct) conclusion that petitioner was aggrieved by his own dismissal, Pet. App. 10a n.1, should have ended its inquiry. The court of appeals, however, erroneously erected an additional, extra-statutory barrier and then found that petitioner did not surmount it. The court concluded that even though petitioner was aggrieved by the unlawful employment practice he sought to challenge, he could not sue because he "is not included in the class of persons for whom Congress created a retaliation cause of action." *Id.* at 8a; see *id.* at 2a (stating that "sole issue" presented by this case is whether 42 U.S.C. 2000e-3(a) "creates a cause of

action for third-party retaliation for persons who have not personally engaged in protected activity"). That formulation is based on a misunderstanding of the statutory scheme.

Congress did not create a "retaliation cause of action" for anyone. Instead, it made retaliation an "unlawful employment practice," 42 U.S.C. 2000e-3, and separately created a cause of action for a "person * * * aggrieved" by it (or any other unlawful employment practice established by the statute), 42 U.S.C. 2000e-5(f)(1). See *Fair Employment Council* v. *BMC Mktg. Corp.*, 28 F.3d 1268, 1277-1278 (D.C. Cir. 1994) (explaining that plaintiff who is "aggrieved" for purposes of 42 U.S.C. 2000e-5(f)(1) necessarily has a "cause of action" under Title VII). The statute's remedial provisions, not the anti-retaliation prohibition itself, establish how the statute is to be enforced and by whom.

In reaching its conclusion that petitioner had no "cause of action," the court of appeals mistakenly relied on *Davis* v. *Passman*, 442 U.S. 228 (1979). See Pet. App. 9a & n.1. *Davis* addressed the question whether, in the *absence* of any statutory cause of action, "a cause of action and a damages remedy can * * * be implied directly under the Constitution when the Due Process Clause of the Fifth Amendment is violated." 442 U.S. at 230. In answering that question, the Court said it was necessary to determine whether the substantive Constitutional provision at issue suggested that "a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court." *Id.* at 240 n.18.

As *Davis* itself explained, however, "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that

is protected by the Constitution." 442 U.S. at 241. When statutory rights are at issue, "it is entirely appropriate for Congress, in creating these rights and obligations, to determine in addition who may enforce them and in what manner." *Ibid.* And when Congress does so, "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499-500 (1985); see *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2139 (2008) (declining to "read a first-party reliance requirement into [the statutory cause of action in the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1964(c)] that by its terms suggests none").

In the case of Title VII, Congress specified who may enforce the prohibitions on unlawful employment practices in 42 U.S.C. 2000e-5(f)(1), where it provided a cause of action for a "person claiming to be aggrieved" by a violation of the statute. The question of who is a proper Title VII plaintiff is thus governed by that express statutory provision, see Pet. App. 30a (Rogers, J., concurring), not by the test courts apply when deciding whether to provide a constitutional remedy in the absence of a statutory cause of action.

D. Allowing Petitioner A Cause Of Action Is Consistent With Both The EEOC's Longstanding Position And Sound Enforcement Policy

The EEOC has long maintained that "[r]etaliation against a close relative of an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees." *EEOC Compliance Manual* § 8-II(B)(3)(c) (1998); see p. 13, *supra* (discussing

deference owed EEOC's views). This interpretation of Title VII's remedial provisions is reasonable and also reflects sound enforcement policy.

The court of appeals opined that its "interpretation [did] not undermine the anti-retaliation provision's purpose because retaliation is still actionable, but only in a suit by a primary actor who engaged in protected activity." Pet. App. 28a-29a. That view would leave the individual who was fired at the mercy of someone else to remedy his injury. And while, years after petitioner's retaliatory dismissal, the interests of the now-married couple at issue here remain sufficiently aligned that Regalado would have had the incentive to fully vindicate petitioner's rights, that will not always be true. Marriages end; relatives become estranged; settlements are offered that divide interests.

Moreover, as a practical matter, it is the person who has been directly harmed by an employer's action, not the person whose exercise of underlying Title VII rights has been chilled, who is most likely to sue. That is true both because the person who suffers direct harm often has the most to gain from a lawsuit and because the person who is the intended target of the retaliation often has the most to lose. If, for example, a son were fired to retaliate against a father, the father would have little direct financial motive to sue and might well be afraid to pursue further action against the employer. The employer would still be in a position to do him harm, and he would be well aware that it already had sought to punish him for protected activity. The fired son, on the other hand, would have more incentive to sue and less fear of doing so.

Foreclosing suit by the person who suffered harm most directly would also unnecessarily complicate a

court's ability to provide adequate relief. To be sure, Title VII provides a court broad authority to craft equitable remedies, 42 U.S.C. 2000e-5(g)(1), and in a hypothetical retaliation suit by Regalado, she could have asked the district court to exercise that authority to secure some form of recompense for a third party such as petitioner. But the boundaries of such authority to order relief for a party not before the court remain untested. It would be far simpler to allow a lawsuit seeking reinstatement and back pay for a dismissed employee to be conducted by the person who suffers the direct harm, the dismissed employee himself.

Finally, limiting the class of people who can bring a Title VII complaint in a way that is not evident on the face of the statute amounts to a trap for unrepresented litigants. Title VII is "a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972). Most couples in the position of petitioner and Regalado would likely conclude that the one who was fired (not the one still employed) should be the one to sue. In that case, the fired employee would likely be the only one to satisfy the prerequisite to suit by filing a timely charge with the EEOC. As a practical matter, an interpretation of Title VII that would bar a suit by the most obvious plaintiff would thus leave many injured parties without a remedy.

CONCLUSION

The judgment of the court of appeals should be reversed and the case should be remanded for further proceedings.

Respectfully submitted.

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AMICUS CURIAE BRIEF

- 291
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No. 09-291

IN THE

Supreme Court of the United States

ERIC L. THOMPSON,

Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Section 704(a) of Title VII, 42 U.S.C. § 2000e-3(a), forbids an employer to retaliate against an employee or job applicant because that individual engaged in certain protected activity pertaining to the enforcement of Title VII rights. The questions presented by petitioner are:

I. Whether Section 704(a) forbids an employer from retaliating for such activity by inflicting reprisals on a third party who is closely associated with the employee who engaged in protected activity.

II. Whether the prohibition on retaliation can be enforced in a civil action brought by the third party victim.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing approximately 300,000 direct members with an underlying membership of more than three million businesses and organizations of every size, in every sector, and from every region of the Country. More than 96 percent of the Chamber's members are small businesses with 100 employees or fewer. A significant majority of the Chamber's members are employers who are subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as other federal antidiscrimination laws. The Chamber has represented the interests of its members before this Court on numerous occasions, including in Title VII cases. *See, e.g.*, *Crawford v. Metropolitan Gov. of Nashville*, 129 S. Ct. 846 (2009); *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343 (2009); *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

This case involves Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3. Retaliation claims under that law, as well as under the anti-retaliation provisions of other employment laws, have increased

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. The parties have filed letters with the Clerk of the Court providing consent to the filing of this and all other *amicus* briefs.

dramatically over the last two decades. In 1992, when the Equal Employment Opportunity Commission began collecting charge data, 10,499 retaliation claims were filed under Title VII, which accounted for 14.5 percent of all charges filed with the EEOC. In 2009, complainants filed 28,948 Title VII retaliation claims, which accounted for 31 percent of all the charges filed. *See* EEOC, Charge Statistics, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (data for 1997 to 2009); http://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm (data for years prior to 1997). Put another way, the number of retaliation charges ballooned by 175 percent, and their share of the EEOC's charge docket has more than doubled.

The Chamber and its members are committed to achieving workplaces free of the racial, ethnic, gender, and religious discrimination that Title VII proscribes, and they strongly oppose any effort by employers to retaliate against individuals for exercising their rights under federal law. At the same time, not all claims brought against employers are meritorious, and some disgruntled individuals wield "anemic" or "largely groundless" claims as an "*in terrorem*" means of obtaining money or inflicting retribution on a disliked superior, co-worker, or employer. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). Furthermore, studies have estimated that it costs, on average, over $120,000 just to defend a wrongful discharge claim. *See* Lewis Maltby, *The Projected Economic Impact of the Model Employment Termination Act*, 536 Annals Am. Acad. Pol. & Soc. Sci. 103, 107 (1994). That sum does not include the costs of any settlement or judgment that an employer may have to pay. For small businesses in difficult

economic times, expanding litigation costs and the opportunities for meritless claims have a direct impact on business viability, growth, and survival. The Chamber and its members thus have a vital interest in the outcome of this litigation, and present this brief to place the perspective and extensive experience of a broad range of American employers before the Court.

SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act protects two classes of employees. First, it protects employees who suffer discrimination on the basis of status, *i.e.*, race, color, religion, sex, or national origin. Second, it protects employees who engage in protected conduct, such as opposing discrimination or participating in the complaint process. Petitioner argues that this Court should extend Title VII to protect a third category of employees, who have not suffered discrimination on the basis of a protected status, nor participated in protected conduct, but who are "closely associated" with other employees who are protected. This claim to "litigation by association" finds no support in the text, structure, or purpose of the statute, and the extensive line-drawing challenges it would impose and the costs it would exact require that any judgment about expanding Title VII in this manner be made by Congress.

Moreover, petitioner's proposed rule would stretch the terms of Section 2000e-3 and standing principles beyond their breaking point, all in order to offer relief to a class of plaintiffs that neither meets Congress's criteria for retaliation claims nor requires a right to sue to fulfill Title VII's purposes. Section 2000e-3 already protects a broad range of employees,

including anybody who "opposes" discrimination, or who participates "*in any manner*" in the complaints process. In the broad run of cases, family members and other genuinely close associates will do something to oppose discrimination against their family member or friend, and will likely participate in helping to remedy that discrimination. If they suffer reprisals, all of those individuals will be able to articulate their own retaliation claims that fall squarely within Title VII's text. Petitioner's case does not fit that mold because, while eager to file his own Title VII suit, his complaint identifies nothing he did to support the fiancée whose legal rights he now wants to borrow.

Congress did not intend for Section 2000e-3 to protect such unusual close-enough-to-sue-but-not-close-enough-to-help associates of protected employees. The text of the statute not only fails to mention third parties, but is precisely framed in terms of protecting only the employee who engaged in privileged conduct. Nor, if the aim of Section 2000e-3 is to vindicate the rights of the protected employee – here, petitioner's fiancée – does it make sense for litigation to proceed when the complaint is devoid of any allegation of injury to or intimidation of that employee. Furthermore, there is no sound reason for the Court to open Title VII up to "litigation by association" claims because the protected employee already can enforce her rights when retaliation takes the form of action against friends and family, and she has every incentive to do so. That course of action would be consistent with the language of the statute, as well as the longstanding prudential norm that the victims of discrimination should assert their own rights themselves.

Petitioner's reformulation of Title VII, moreover, would steer the courts into a storm of definitional line-drawing, unhinged from statutory text or congressional direction. It would also impose upon employers the task of monitoring their employees' associations to determine which ones are "close enough" to confer protection from discipline. And courts would have to devise a network of rules to ensure that the third-party complaint actually addresses the protected employee's legal injury, rather than exclusively benefitting the third party. That litany of interpretive and implementation problems is a good sign that any decision to modify the statute's coverage should be left to Congress.

ARGUMENT

TITLE VII'S ANTI-RETALIATION PROVISION APPLIES ONLY TO INDIVIDUALS WHO THEMSELVES ENGAGE IN PROTECTED CONDUCT

At bottom, petitioner's and the Solicitor General's argument is this: petitioner has an injury but no retaliation claim or statutory protection of his own; his fiancée enjoys statutory protection against retaliation, but has no legally cognizable injury of her own; and the "close association" between the two of them alchemizes the two non-claims into a viable cause of action for retaliation under Title VII. But two "noes" do not make a "yes." When Congress wants association with a protected person to constitute unlawful employment discrimination, it says so directly. It did not say so in Title VII. Quite the opposite, the plain text of the retaliation provision focuses singularly on protecting the individual who actually engaged in protected

conduct. That is dispositive. The profoundly complicated policy judgments and definitional line-drawing involved in expanding the statute to permit litigation by anyone who meets the entirely atextual standard of "close-enough association" are not for the courts to undertake in the first instance.

A. Petitioner's Claim Does Not Fall Within Title VII's Retaliation Provision Because He Did Not Engage in Any Protected Conduct

Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, protects two classes of employees from discrimination. First, Title VII makes it illegal "to discriminate against any individual" in employment "because of such individual's" protected status: his or her "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). Petitioner does not argue that his termination violated that provision. While his claim of discrimination is a status-based claim – his status as the fiancé of an alleged discriminatee – that is not a status that Section 2000e-2(a) protects.

Unlike Section 2000e-2(a), Title VII's retaliation provision focuses on protected conduct, not status. *Burlington Northern. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006). More specifically, Title VII separately makes it unlawful for an employer:

> to discriminate against any of his employees * * * because he has opposed any practice, made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 2000e-3(a).

Petitioner's claim does not fit within Section 2000e-3(a) either. He does not allege that respondent fired him because of anything he did. In particular, he does not allege that he "has opposed any practice" made unlawful by Title VII, nor that he "made a charge, testified, assisted, or participated in" any aspect of his fiancée's effort to vindicate her rights under Title VII. The complaint, instead, is quite explicit that petitioner (allegedly) was fired "sole[ly]" because of his "relationship to Miriam Thompson," his then-fiancée. J.A. 12-13.[2]

This case thus is not about whether a related individual who meets the elements of Section 2000e-3 enjoys Title VII's protection. Instead, this case is about revamping the anti-retaliation provision from a conduct-based protection into a protection for associational status, even when the plaintiff admits that he has not suffered and cannot prove the indispensable statutory element of discrimination *on the basis of conduct* proscribed by Section 2000e-3. *See Burlington Northern*, 548 U.S. at 63.

Congress undoubtedly could craft a retaliation provision along the lines that petitioner suggests. Indeed, Congress did just that in the Americans with Disabilities Act, which expressly defines "discrimination" to include discrimination against

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[2] In a deposition, petitioner stated that he had helped Regalado prepare her EEOC complaint. *See* Pet. App. 47a However, his complaint in the district court disavows the notion that this conduct – which would have been protected under Section 2000e-3(a) – had anything to do with his termination.

third parties "with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4).[3] Likewise here, Congress could have said that "it shall be an unlawful employment action for an employer to discriminate against any of his employees *or any closely associated third party* because *the employee* has opposed any practice, made an unlawful employment practice under Title VII." But Congress did not say that. And courts cannot say it for Congress. This Court's "charge is to give effect to the law Congress enacted." *Lewis v. City of Chicago*, 130 S. Ct. 2191, 2200 (2010).

Petitioner compares Title VII to the National Labor Relations Act ("NLRA"), Pet. Br. 24-26, but that comparison favors the Chamber. None of the NLRA cases granting relief to third parties were decided under that statute's retaliation provision, which (like Section 2000e-3) makes it unlawful to "discriminate against an employee" in retaliation for protected conduct. 29 U.S.C. § 158(a)(4). Instead, these cases applied the much broader language of 29 U.S.C. § 158(a)(1), which makes it unlawful to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by the NLRA.[4]

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[3] *See also* 18 U.S.C. § 3521 (vesting Attorney General with discretion to protect "the immediate family of, or a person otherwise closely associated with [a federal] witness"); 18 U.S.C. § 115(a)(1) (criminalizing murder or assault of "the immediate family of a United States official").

[4] *See* Pet Br. 24 n.34 (citing six cases, all conforming to this pattern); *see also Tasty Baking Co. v. NLRB*, 254 F.3d 114, 127 (D.C. Cir. 2001) (relying on Section 158(a)(1) to grant relief); *Kenrich Petrochemicals, Inc. v. NLRB*, 907 F.2d 400, 402 (3d

Congress excluded similarly capacious language from Title VII's retaliation provision and, given the acknowledged similarity between the two statutes, Congress must have "intended its different words to make a legal difference." *Burlington Northern*, 548 U.S. at 62-63.

B. Regalado Did Not Suffer Discrimination Under Section 2000e-3

Petitioner's and the Solicitor General's central argument is that petitioner's firing was actually retaliatory discrimination against his fiancée, Miriam Regalado, who had earlier filed a gender discrimination complaint against respondent. Pet. Br. 9-20; U.S. Br. 11-14. That argument fails, for three reasons.

1. Petitioner's Termination Was Not Discrimination "Against" Regalado

The text of Section 2000e-3 is pointed, defining unlawful retaliation specifically as an adverse action directed "against" the same individual that opposed or complained about unlawful discrimination. Title VII's retaliation provision makes it unlawful for an employer to "discriminate *against* any individual * * * because *he*" has engaged in protected conduct. 42 U.S.C. § 2000e-3(a) (emphases added). "Against" means "with respect to," or "toward." Webster's Third New International Dictionary 39 (1971).

Accordingly, to discriminate "against" an individual who engaged in protected conduct under

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Cir. 1990) (en banc) (same); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086, 1088 (7th Cir. 1987) (same).

Section 2000e-3(a), the employer must single out *that individual* for adverse treatment. Indeed, "[n]o one doubts that the term 'discriminate against' refers to distinctions or differences in treatment that injure [the] protected individuals." *Burlington Northern*, 548 U.S. at 59; *see Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 174 (2005) (holding that retaliation constitutes "a form of 'discrimination' because *the complainant* is being subjected to differential treatment") (emphasis added). Thus, the statute requires that the person "against" whom the employer acts and the person that engaged in the statutorily protected conduct be one and the same, and not merely "associated," as petitioner proposes.

2. *Regalado Did Not Suffer Injury or Harm, and Therefore Did Not Suffer "Discrimination" Under Section 2000e-3*

Regalado was not subjected to "discrimination," and petitioner's claim that his termination constituted "discrimination" against his fiancée relies on a definition of the term "discrimination" that effectively empties it of meaning. In petitioner's view, "discrimination" need not involve any actual harm, injury to, or differential treatment of its intended victim. The text of Section 2000e-3 and this Court's precedent applying that language foreclose petitioner's interpretation.

First, this Court recently established that Section 2000e-3(a) protects an individual "not from all retaliation, but from retaliation that produces an injury or harm." *Burlington Northern*, 548 U.S. at 67. But nowhere does the complaint allege that Regalado herself suffered any injury at all, let alone

legally cognizable "discriminat[ion]" under Section 2000e-3. Nor does the complaint seek any remedy (monetary or equitable) that would run to Regalado. The complaint plainly identifies only injury to petitioner, in the form of lost wages, personal humiliation, and embarrassment, and those are the only injuries for which relief is sought. J.A. 13. The rest of the record is similarly devoid of evidence that Regalado suffered any injury. In her deposition, she never mentioned any harm to herself resulting from petitioner's termination. And in his brief to this Court, petitioner affirmatively argues that his termination did *not* cause his fiancée to suffer a remediable injury of her own. Pet. Br. 43 ("If Regalado herself were to file suit, Article III would at the least pose a serious obstacle to obtaining any of the relief needed to redress the injuries caused by the unlawful third party reprisal against Thompson."). Without the essential element of harm to a protected person, a claim for retaliation does not arise.[5]

Second, the essence of "discrimination" is differentially adverse treatment. *Burlington Northern*, 548 U.S. at 59; *id.* at 65 (citing EEOC Compliance Manuals from 1988 and 1991); *see also*

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[5] In making this statement, petitioner attempts to thread a needle, arguing that his fiancée suffered just enough injury to be a victim of discrimination so that he can sue, Pet. Br. 10, but not enough injury to have standing to vindicate her own rights, *id.* at 43. That makes no sense. If Article III bars Regalado from suing, it would equally bar petitioner from suing to remedy the same non-injury. Conversely, if Article III does not bar Regalado from bringing her own claim, then it is difficult to understand why this Court should wring and strain the statutory text to enable petitioner to sue on her behalf.

Jackson, 544 U.S. at 174 (noting that retaliation "is a form of 'discrimination' because the complainant is being subjected to differential treatment"). But nowhere does petitioner allege, or the record reflect, any adverse change in Regalado's working conditions, any differential treatment of Regalado by respondent, or any other "distinctions or differences," inside the workplace or out, in how respondent treated her, which is what Section 2000e-3's "discriminate against" language requires. *Burlington Northern*, 548 U.S. at 59.

Third, petitioner argues that the "touchstone" of the retaliation provision is not the phrase "discriminate against," but the word "because," and that "the intent of the employer in taking the allegedly retaliatory action" is key. Pet. Br. 10. No doubt petitioner must prove intent as *one* essential element of any retaliation claim. But the two elements listed above – harm and differential treatment – are equally indispensable. *Burlington Northern*, 548 U.S. at 65-67. It is the absence of those two elements from the complaint that dooms petitioner's claim, and also establishes that his interpretation of the statute is at odds with its core requirements.

Fourth, petitioner argues that this Court should expand the scope of Section 2000e-3 to include his claim because otherwise Title VII would not provide a satisfactory remedy for Regalado's (non-alleged) injury. Pet. Br. 43. The United States, however, says the opposite, explaining that Regalado could sue to obtain petitioner's back wages or reinstatement. U.S. Br. 27. If the United States is correct, then there is no reason to expand Title VII in the manner

petitioner proposes because the person who engaged in protected conduct can be made whole without grafting a "close associates" addendum on to the statutory text. *See* U.S. Cert. Br. 11 (foreclosing third-party actions would "Not Leave A Substantial Gap In Title VII's Coverage").

In any event, dissatisfaction with the scope of Title VII's remedies is not a reason to judicially modify the scope of the statute. Congress proceeded circumspectly in formulating damages remedies under Title VII. When first enacted, the statute did not permit compensatory or punitive damages. *See United States v. Burke*, 504 U.S. 229, 238 (1992). After study, Congress amended the statute in 1991, *see* 42 U.S.C. § 1981a, to expand the relief available in a manner consistent with the careful balance between employers and employees that Title VII strikes. *See United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206 (1979) (to obtain the support of "legislators in both Houses who traditionally resisted federal regulation of private business," Title VII's proponents carefully formulated damages provisions that left "management prerogatives * * * undisturbed to the greatest extent possible" (quoting H.R. Rep. No. 914, 88 Cong., 1st Sess., pt. 2, p. 29 (1963)). Judicially altering Title VII in a manner that changes who can sue for what would unravel the balance that Congress struck.

Finally, petitioner argues that the Court should defer to the EEOC's interpretation of the statute as permitting such third-party suits. But, to the extent that the EEOC has weighed in on this question, it has only done so in its compliance manual, not by regulation. While the compliance manual is "entitled

to respect," it is by no means controlling on this Court. *See Kentucky Ret. Sys. v. EEOC*, 128 S. Ct. 2361, 2371 (2008). That is particularly true here, where the EEOC's position is rooted in policy arguments rather than any ambiguity in statutory text.

3. Policy Arguments Do Not Create an Injury that the Complaint Does Not Allege or that Title VII Has Not Already Solved

Petitioner argues that "hurting a member of his family" constitutes an "ancient method of revenge," Pet. Br. 17. That is no doubt true. The problem here, however, is that his case does not present that problem and, as the United States makes clear, construing Section 2000e-3(a) to reach petitioner's claim is not necessary to protect against ancient modes of revenge.

First, petitioner's arguments and complaint do not match up. He was not a "member of [Regalado's] family" at the time of his termination and his complaint alleges no harm or injury to Regalado. Nor has Regalado asserted any violation of her own rights under Title VII's retaliation provision or claimed any injury herself. None of the remedies sought run to her either. Thus, rather than track any ancient pattern of vengeance, this case presents the quite unusual scenario of action (i) taken against a non-family member (ii) who offered no show of support for the protected employee's conduct, (iii) that does not result in any alleged harm or injury to the protected employee or have any discernible dissuasive effect on her willingness to continue pursuing her legal claims.

Second, expanding Section 2000e-3 to encompass petitioner's unusual complaint is not necessary because, as the United States argues (U.S. Br. 27) and the court of appeals agreed (Pet. App. 29a n.10), the protected employee herself could bring suit under the retaliation provision and could obtain effective relief. Section 2000e-3 thus affords Regalado all the protection Congress intended against any alleged "revenge," however inflicted. Accordingly, judicially expanding Title VII is "simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely." *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

Furthermore, it would be unusual for a genuinely "close associate" or family member to take no steps whatsoever to support the protected employee in a claim of Title VII's caliber, especially if that same "close associate" is fully willing to litigate a Title VII claim himself. Indeed, case law corroborates that, in the vast majority of cases, "closely associated" third parties do oppose discrimination or participate in the complaint process. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1227 (5th Cir. 1996). Thus close family members will commonly be able to fit within the natural sweep of Section 2000e-3(a).

Amicus National Women's Law Council ("NWLC") argues that cases of third-party retaliation are not, in fact, rare. But its proof demonstrates the opposite. NWLC scoured federal and state reporters

over a fifteen-year period and found only seventeen third-party retaliation cases – barely more than one case a year – from 1995 to 2009. *See* NWLC Br. iv-v. During that same period, complainants filed 340,023 federal retaliation charges with the EEOC.[6] NWLC's third-party suits thus accounted for only .005 percent of all retaliation charges.

Third, the fact that Congress already crafted the statute in a manner that covers the ordinary sweep of retaliation claims against family members suggests that any small gaps in coverage, such as those presented by petitioner's anomalous no-help-by-him/no-harm-to-her scenario, reflect deliberate line-drawing by Congress. After all, "no legislation pursues its purposes at all costs," and "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987) (per curiam).

To begin with, the focused text of the anti-retaliation provision encourages use of the complaints process and supports those who join in opposing unlawful conduct. Congress deliberately linked the statutory protection to an individual's engaging in protected conduct, and "vague notions of

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[6] *See* EEOC, Charge Statistics, *available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (data for 1997 to 2009) and http://www.eeoc.gov/eeoc/statistics/enforcement/charges-a.cfm (data for years prior to 1997). The numbers in this paragraph refer to all retaliation claims, not only those under Title VII, because NWLC did not restrict its presentation to Title VII retaliation cases.

a statute's 'basic purpose' are * * * inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). The statute as-is balances the needs of a discrimination-free workplace and creating incentives to report discrimination against protecting employers from litigation by the boundless class of "close-enough associates" who could dispute management decisions simply by claiming some affiliation with a protected employee.

Likewise, the limitations of the statutory text may reflect Congress's balancing of its interest in non-discrimination with an interest in employees' ability to keep most of their private associations just that – private. Employers have a legitimate interest in maintaining sufficient information so that they can ensure compliance with the law. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (recognizing affirmative defense for employers who implement compliance programs). As written, the retaliation provision allows employers to fulfill this imperative without probing the private lives of employees. But once the status of "close associate" is accorded independent legal significance under Section 2000e-3, employers will need to learn about and document in records, 42 U.S.C. § 2000e-8(c), the now not-so-private and non-familial relationships of employees.

It is no answer to that concern to argue, simplistically, that employers should just not fire individuals without legitimate cause. That would mean that Title VII effectively disposed of at-will employment. It did not. "'[E]mployers may hire and fire, promote and refuse to promote for any reason,

good or bad, provided only that individuals may not be discriminated against because of race, religion, sex, or national origin.'" *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 462 n.35 (1986) (quoting 110 Cong. Rec., at 6549 (remarks of Sen. Humphrey)).

The argument also ignores the significant volume of meritless Title VII claims brought and the enormous employer and judicial resources they consume. The Federal Judicial Center recently compared the number of employment discrimination claims terminated by summary judgment with other lawsuits to arrive at the "striking" result that federal district courts were three to five times more likely to grant summary judgment motions on employment discrimination claims. *See* Joe Cecil & George Cort, Report on Summary Judgment Practice Across Districts with Variations in Local Rules 3, 17 (Aug. 13, 2008), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf. Those findings are unsurprising, since Title VII retaliation claims are easy to plead. "[I]n order to survive a motion to dismiss, 'all [the] complaint has to say, is the [employer] retaliated against me because I engaged in protected activity.'" *Rochon v. Gonzales*, 438 F.3d 1211, 1220 (D.C. Cir. 2006) (citations omitted). Additionally, this Court has held that an employee can sometimes demonstrate causation simply by showing that the action taken against him occurred shortly after protected activity. *See Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (noting that "mere temporal proximity" might suffice if the time period is "very close").

Fourth, the United States contends that third-party retaliation suits are worthwhile because those individuals are "more likely to sue." U.S. Br. 26. However, the point of the retaliation provision is not to maximize the number of lawsuits filed. The point is to permit those who have meritorious retaliation claims to bring them. And it is far from clear – indeed, unlikely – that third parties will bring more meritorious claims than the actual victims.

Furthermore, if the plaintiff and the direct victim are, in fact, "closely associated," the litigation effort is likely to be so integrated and the burden jointly borne that it is hard to understand, as a practical matter, why one would sue rather than the other. Presumably, their litigation resources could just as easily be channeled into a lawsuit by the employee who engaged in the conduct that Title VII protects, rather than leaving that employee on the sidelines, while the "close associate" brings a retaliation once-removed lawsuit.

The United States also argues that it would be "simpler" to allow petitioner to sue on his own. U.S. Br. 27. That makes little sense since retaliation against the primary victim will still have to be proven, and the third-party standing questions that petitioner's position raises are anything but simple, *see* Section C, *infra*. Beyond that, the drive for simplicity does not constitute a sufficiently weighty interest to overcome the clear limitations imposed by the statute's text.

The United States then protests that unrepresented plaintiffs would find the scheme counterintuitive. But every Title VII claim must begin with a charge filed with the EEOC, and the

agency is in a good position to inform whoever makes a charge – whether the protected employee or her close associate – of the proper course of action. Furthermore, there is nothing counterintuitive about enforcing Title VII's plain text or requiring that victims bring suit themselves.

Fifth and finally, while there is little to gain by extending the retaliation provision to the close associate who does nothing to help the protected employee, there is much to lose. The test that petitioner advances has no meaningful boundaries. Employers would face a compliance nightmare, as they would have no realistic way of knowing which employees are "close enough" to trigger Section 2000e-3's protection. When it last considered "close association," as a proposed standard for administering *res judicata* principles, this Court unanimously rejected it as unworkable, explaining that determining whether two people were "close enough" would "create more headaches than it relieves" by "spark[ing] wide-ranging, time-consuming, and expensive discovery," which district courts would then have to "evaluate * * * under a standard that provides no firm guidance." *Taylor v. Sturgell*, 553 U.S. 880, 898, 901 (2008).

Likewise, in *Lans v. Digital Equipment Corp.*, 252 F.3d 1320 (Fed. Cir. 2001), the Federal Circuit declared "closely associated" to be an "unworkable" standard for identifying notice from a patentee. Adopting that standard, the court explained, would "present difficult, if not unworkable, enforcement problems," because "[c]ourts would have to decide the degree of association sufficient to satisfy the rule,"

and the outcomes would inevitably prove arbitrary. *Id.* at 1327.

Indeed, the limitless reach of the phrase "closely associated" is legendary, with courts of appeals having already held, in a variety of contexts, that the following individuals are "closely associated" or "close associates": people who kiss, *United States v. Devine*, 934 F.2d 1325, 1337 (5th Cir. 1991); police officers who worked a beat together, *Moore v. City of Phila.*, 461 F.3d 331, 334, 344 (3d Cir. 2006); partners in a law office, *United States v. Hively*, 437 F.3d 752, 765-766 (8th Cir. 2006); "friends or family," *Zhang v. Gonzales*, 408 F.3d 1239, 1249 (9th Cir. 2005); "a brother and a university colleague," *Ghebremedhin v. Ashcroft*, 385 F.3d 1116, 1120 (7th Cir. 2004); a trusted aide, *Camacho v. Brandon*, 317 F.3d 153, 157 (2d Cir. 2003); friends who use nicknames for each other and share common interests, *United States v. Cervine*, 347 F.3d 865, 872 (10th Cir. 2003); a judge's secretaries and law clerk, *Humphreys v. Drug Enforcement Admin.*, 96 F.3d 658, 660 (3d Cir. 1996); business associates who "went on road trips to car shows together and spent time together on vacation with their families in Florida," *United States v. Marek*, 548 F.3d 147, 153 (1st Cir. 2008); business partners and people in a vendor-customer relationship, *Juicy Whip, Inc., v. Orange Bang, Inc.*, 292 F.3d 728, 743 (Fed. Cir. 2002); a hanger-on to a street gang, *United States v. Matthews*, 312 F.3d 652, 666 (5th Cir. 2002); a client's "long-time lawyer," *United States v. Colton*, 231 F.3d 890, 895 (4th Cir. 2000); "partners in crime," *United States v. Jones*, 432 F.3d 34, 42-43 (1st Cir. 2005); and fellow prison inmates, *United States v. McCullough*, 457 F.3d 1150, 1166 (10th Cir. 2006).

Further, if pre-marital engagement constitutes a close association, as petitioner contends, there is no logical reason why living together, dating, having an affair, sharing a close friendship, or working together on a lengthy project would not also suffice. Courts, in fact, have often defaulted to the phrases "close associate" and "closely associated" to describe people who share confidences or have loyalty to each other. *See, e.g.*, *Love v. Associated Newspapers, Ltd.*, 611 F.3d 601, 608 (9th Cir. 2010); *Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 125 (2d Cir. 2009); *United States v. Magluta*, 418 F.3d 1166, 1181 (11th Cir. 2005).

In sum, simply identifying a perceived gap in coverage, as petitioner does, says nothing about whether that gap was intended or unforeseen. Either way, its mere existence does not empower the Court to graft new language onto otherwise unaccommodating statutory text just because it is deemed to be good policy. *See Hubbard v. United States*, 514 U.S. 695, 703 (1995) ("[A]bsent any indication that doing so would frustrate Congress's clear intention or yield patent absurdity, our obligation is to apply the statute as Congress wrote it.") (quotation marks omitted). If new lines are to be drawn, they should be drawn by Congress in the first instance.

C. Petitioner Cannot Bring Suit to Vindicate Alleged Retaliation Against Regalado

Underscoring the calibrated reach of the anti-retaliation provision are parallel limitations on who can bring suit under Title VII. The statute's enforcement provision, 42 U.S.C. § 2000e-5(f),

provides that any "person aggrieved" may sue and, read in context, that does not extend to the type of third-party enforcement of the anti-retaliation provision proposed by petitioner, especially when, as here, there is no reason the protected employee could not have filed suit herself.

1. The Presumption Is Against Third-Party Standing

Petitioner's central argument is that his firing violated Regalado's Title VII rights and that Title VII permits him to press Regalado's claim for her. The mere articulation of the argument raises red flags because a central feature of this Court's prudential standing doctrine is "the general rule that a party 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Hinck v. United States*, 550 U.S. 501, 510 n.3 (2007) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004)); *see also Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (applying the "general prohibition on a litigant's raising another person's legal rights") (citation omitted); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). That principle holds "even when the very same allegedly illegal act that affects the litigant also affects a third party." *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990). The Court has recently applied that principle to deny standing to litigants attempting to assert the rights of others. *See, e.g.*, *Hinck*, 550 U.S. at 510 n.3 (2007) (denying standing to taxpayers seeking to assert other taxpayers' due process challenge to Tax Court's jurisdictional limitations); *Kowalski*, 543 U.S. at 132

(denying standing to attorneys seeking to represent the interests of future clients).

The starting presumption thus is that, if respondent's termination of petitioner violated Regalado's rights, then Regalado – not petitioner – should file suit under Title VII to enforce the anti-retaliation provision. Here, petitioner offers only one objection to that ordinary rule: he objects to the scope of relief that Title VII affords Regalado. But statutory claims come with the relief that the statute prescribes – that is how statutory causes of action work. Here, that includes compensatory damages, 42 U.S.C. § 1981a, and equitable relief. A litigant's or court's dissatisfaction with that legislative judgment does not license casting aside prudential standing rules simply to forge a preferred remedial path.

2. *The Phrase "Person Aggrieved" Does Not Expressly Negate the Rule Against Third Party Standing*

Congress "legislates against the background of [the Court's] prudential standing doctrine," and thus the prohibition on third-party enforcement controls "unless it is expressly negated." *Bennett v. Spear*, 520 U.S. 154, 163 (1997) (citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345-348 (1984)). Nothing in Title VII's text, however, expressly negates the background rule that Title VII plaintiffs who are able must press their claims themselves.

Petitioner argues that Congress's use of the phrase "person aggrieved" in its cause of action provision, 42 U.S.C. § 2000e-5(f), waives prudential standing requirements. Quite the opposite is true. In *Director, Officer of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry*

Dock Co., 514 U.S. 122 (1995), this Court held that the phrase "person * * * adversely affected or aggrieved" in the Administrative Procedure Act, 5 U.S.C. § 702, does not waive prudential standing requirements. 514 U.S. at 126. The phrase "person adversely affected or aggrieved," the Court explained, is a "term of art" that appears in many statutes, and does not suspend traditional prudential standing rules. *Id.* at 126-127 (citing the Federal Communications Act of 1934, 47 U.S.C. § 402(b)(6); Occupational Safety and Health Act of 1970, 29 U.S.C. § 660(a); Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 816)); *see also Coalition for Pres. of Hispanic Broad. v. FCC*, 931 F.2d 73, 79 (D.C. Cir. 1991) (dismissing the case under Federal Communications Act "on prudential standing grounds"); *R.T. Vanderbilt Co. v. Occupational Safety and Health Review Comm'n*, 728 F.2d 815, 818 (6th Cir. 1984) (same for Occupational Safety and Health Act case). This Court has also held that the analogous phrase "[a]ny person injured" in RICO, 18 U.S.C. § 1964(c), requires a plaintiff to show more than that "the defendant violated § 1962, the plaintiff was injured, and the defendant's violation was a 'but for' cause of plaintiff's injury." *Holmes*, 503 U.S. at 265.

Petitioner relies on *Trafficante v. Metropolitan Life Insurance Company*, 409 U.S. 205 (1972), to assert that "person aggrieved" waives all prudential standing requirements. In *Trafficante*, this Court held that the cause of action provision in the Fair Housing Act, which refers to "person aggrieved" "define[s] standing as broadly as is permitted by Article III of the Constitution." *Id.* at 209. The problem for petitioner is that the Court so ruled

because the Fair Housing Act goes on to define a "person aggrieved" specifically as "any person who * * * claims to have been injured by a discriminatory housing practice," *id.* at 206 (quoting 42 U.S.C. 3602(i)(1)).

The fact that Congress found it necessary to define "aggrieved person" expressly to include any person claiming injury proves that the phrase "aggrieved person," standing alone, does not discard prudential standing principles and reach to the boundaries of Article III. Otherwise, there was no reason for Congress to add the extra definitional phrase, and the law is well-settled that the Court "must, if possible, construe a statute to give every word some operative effect." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). Indeed, in *Warth v. Seldin*, *supra*, this Court explained that the suspension of prudential standing limitations in *Trafficante* turned upon Congress's adoption of a particularly "broad definition of 'person aggrieved' in § 810(a) [of the Fair Housing Act]." 422 U.S. at 513.

The United States' reliance on *Federal Election Commission v. Akins*, 524 U.S. 11 (1998), similarly depends upon a truncation of the relevant statutory language. In *Akins*, this Court held that voters could bring suit under a statutory provision stating that "[a]ny party aggrieved by an order of the Commission dismissing a complaint filed by such party * * * may file a petition" for judicial review, 2 U.S.C. § 437g(a)(8)(A). *See Akins*, 524 U.S. at 19. But what was critical to the broad scope of "party aggrieved" in that statute was the predecessor statutory provision that expansively defined who could file a complaint with the Commission to include "[a]ny person who

believes that a violation of this Act * * * has occurred," 2 U.S.C. § 437(g)(a)(1). *See Akins*, 524 U.S. at 19. The scope of "part[ies] aggrieved" who could sue when their complaints were dismissed in that statute thus was pre-ordained by the sweeping definition of who could file a complaint in the first place.

The United States' citation of *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), suffers from the same flaw. Unlike Title VII, Section 4 of the Clayton Act contains language that expressly abnegates prudential standing limitations because it directs that "*[a]ny person* who shall be injured in his business or property *by reason of anything* forbidden in the antitrust laws" can bring suit. *Id.* at 472.

The precedents that petitioner and the United States cite thus prove the Chamber's point: Title VII's cause-of-action provision is noteworthy for the absence of any language similar to the specialized definitions of "aggrieved person" that Congress has employed elsewhere to expressly negate prudential standing limitations. Beyond that, to the extent that precedent simply establishes the ambiguity of the phrase "aggrieved person," that proves that Congress's mere employment of that phrase did not "expressly negate" prudential standing limitations.

Furthermore, petitioner never addresses the necessary implications of his position. If he were correct that all prudential standing limitations were suspended by Congress's use of "aggrieved person," that rule would apply to *all* of Title VII's provisions, not just the anti-retaliation provision, because Section 2000e-5(f) applies across Title VII. In addition, *any* person with an Article III injury could

vicariously enforce Title VII claims because nothing in the phrase "aggrieved person" would confine its coverage to "close associates." "[A]ll sorts of persons who are not the intended beneficiaries of Title VII's protections" could bring third-party enforcement actions even when, as here, there is no barrier at all to the primary Title VII claimant (Regalado) bringing suit herself. Pet. App. 32a. Such a rule would effectively place the rights of the actual victims of discrimination at the mercy of third-party claimants, a result certainly not contemplated by the statute or consistent with Title VII's purpose.[7]

Finally, the "cardinal rule" of statutory construction is that "a statute is to be read as a whole." *Corley v. United States*, 129 S. Ct. 1558, 1566 n.5 (2009) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). Petitioner's effort to sever the plaintiff from the individual "discriminate[d] against" under Section 2000e-3 overlooks that Congress crafted Title VII's remedial provisions on the assumption that the individual retaliated against and the plaintiff would be one and the same. For example, 42 U.S.C. § 2000e-5(g)(1) provides that back pay awards shall be reduced by interim earnings that were or could have been obtained "by the person or persons discriminated against." But it would make no sense to have petitioner's back pay reduced by

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[7] Requiring the primary claimant to sue also creates a *de facto* check on the sweep of friends-and-family claims because it is likely that she would only go to the trouble of bringing a retaliation claim if the association were so intimate that it inflicted the type of distinct injury that Title VII aims to remediate – factors that are missing from this complaint.

amounts earned by Regalado, who remained employed by respondent until January 2004, almost a year after petitioner's termination. Resp. Br. 8a. Likewise, petitioner's reading could result in a windfall to a plaintiff who obtained interim income that would not be counted by this provision because the plaintiff was not the "person[] discriminated against."

3. Petitioner's Third-Party Claim Raises Additional Standing and Jurisprudential Concerns

a. No barrier to suit by protected employee

In addition to generally barring third-party enforcement of rights, the prudential standing doctrine forbids *jus tertii* litigation when there is no "hindrance to the third party's ability to protect his own interests." *Powers v. Ohio*, 499 U.S. 400, 411 (1991); *see Kowalski*, 543 U.S. at 132 (attorneys could not sue on behalf of indigent clients because the difficulty of proceeding without an attorney did not constitute "the type of hindrance necessary to allow another to assert the indigent defendants' rights").

There is no indication in Title VII's text that Congress intended to abandon that prudential standing limitation or, more particularly, that Congress perceived that there were significant hindrances to direct enforcement of retaliation claims by employees who had engaged in protected conduct. To the contrary, Congress's textual framing of the anti-retaliation provision in a manner that focuses singularly on the employee who him- or herself engaged in protected conduct indicates that Congress perceived no inherent barriers. Nor is there any allegation that Regalado faced barriers to filing suit

to enforce her rights under the anti-retaliation provision. Indeed, where associations are familial, one would expect that any hindrance to filing would apply equally to them both.

b. Procedural and administrability problems

There are still more problems with petitioner's proposed scheme. The line-drawing challenges that petitioner's theory creates would not stop with trying to define who counts as close-enough associates, but would extend to formulating a battery of procedural rules governing this new "litigation by association" claim. For example, petitioner nowhere explains – and nothing in Title VII indicates – how courts are to order and balance such litigation if one or more close associates and the protected employee all bring suit for the same retaliatory action either at the same time or in different order. Especially if non-family members are permitted to sue, courts will have to formulate unwritten rules governing notice, obtaining permission of the protected employee, ensuring alignment of interests, and any other needed process for protecting the rights and interests of the employee whose retaliation claim is being asserted by a third party. *See Taylor*, 553 U.S. at 900 (listing criteria for adequate representation by third parties).

Similarly, the courts will have to devise rules determining the extent to which the protected employee is bound by judgments already obtained enforcing her rights – which will land the court squarely in the "close enough" rule of *res judicata* that this Court just rejected in *Taylor v. Sturgell*. 553 U.S. at 898.

In addition, in most *jus tertii* cases, the relief sought is equitable or declaratory and thus, as a practical matter, runs equally to the plaintiff and to the person he represents.[8] However, when damages are at issue, this Court has long cautioned against the "hazard[s]" of having legal claims to those payments litigated by a third party. *United Food & Commercial Workers Union v. Brown Group, Inc.*, 517 U.S. 544, 556 (1996). Here, if petitioner really envisions his claim as enforcement of Regalado's (potential) retaliation charge, then any damages that are to be awarded (on top of any equitable reinstatement relief) should belong to Regalado and should measure any harm that *she* suffered from petitioner's termination. It is, after all, *her* retaliation claim that is being litigated and thus only *her* injuries that can be remediated.

Petitioner, however, cuts Regalado out of the recovery altogether, framing his prayer for relief entirely in terms of a recovery that runs exclusively to himself. J.A. 13. That does not sound like enforcement of Regalado's statutory right. It sounds

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[8] Indeed, in equal protection and discrimination cases like *Trafficante*, the *jus tertii* label seems largely misplaced, because the Court has recognized that the right to a nondiscriminatory workplace, business operation, or housing runs to all involved. *See, e.g.*, *Trafficante*, 409 U.S. at 210 (noting that the discrimination injury runs both to the excluded minorities and to white tenants who lose "important benefits from interracial associations"); *id.* at 211 ("The person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is * * * 'the whole community.'"). The retaliation claim asserted here, by contrast, is explicitly individualized and targeted to the individual that engaged in the protected conduct.

like petitioner is instead creating a new statutory right against retaliation of his own that turns entirely on relational status, not conduct. So courts will have to make up all the rules for that too. But this Court recently cautioned against adopting readings of statutory text that compel courts "to develop, in the complete absence of any statutory text," a whole series of "rules governing" theories of legal liability that Congress never addressed. *Samantar v. Yousuf*, 130 S. Ct. 2278, 2291 n.17 (2010).

c. Article III standing

The essential predicate to petitioner's and the United States' argument is the assumption (Pet. Br. 40-41; U.S. Br. 19) that petitioner independently has Article III standing to bring suit, and thus that the prudential barrier to third-party enforcement of claims is all that needs to be overcome. But the existence of Article III standing in this case, and other litigation-by-association cases, is not assured.

The "irreducible constitutional minimum of standing" requires that petitioner "have suffered an injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The premise of petitioner's argument is that his termination by respondent inflicted an Article III "injury in fact." But Article III requires more than just asserting some injury – that injury in fact must involve the "invasion of a legally protected interest." *Ibid.* And that legally protected interest must belong "*to the complaining* party." *Vermont Agency of Natural Res. v. Stevens*, 529 U.S. 765, 771 (2000) (quoting *Warth*, 422 U.S. at 499) (emphasis added by *Stevens*); *see also Valley Forge*

Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982).

Petitioner, however, cites nothing that legally protects *his* interest in non-termination. Kentucky is an at-will employment state, *see Louisville & N.R. Co. v. Marshall*, 586 S.W.2d 274, 281 (Ky. Ct. App. 1979), and petitioner does not claim that his termination violated any contractual, constitutional, or other statutory rights of his own. Nor does he claim any violation of rights accorded to him – as opposed to Regalado – by Title VII. He was not fired because of his race, color, religion, gender, or national origin, or because he engaged in any protected conduct. He instead admits that he is enforcing Regalado's rights alone. Pet. Br. 35.

The problem is that the complaint alleges no injury to Regalado and makes no effort to remediate any assumed injury to her. Instead, given the absence of any claim in the complaint or her deposition of actual injury (adverse employment action, differential treatment, dissuasion from pursuing her rights, or even emotional distress) to Regalado, the remedies petitioner seeks appear to be unhinged from any retaliation relief she herself could obtain. Of course, petitioner may plan to share his recovery with his now-wife. But Article III's redressability prong is not met by showing "what the plaintiff ultimately intends to do with the money he recovers." *Sprint Communications Co. v. APCC Services, Inc.*, 128 S. Ct. 2531, 2542 (2008). It turns on "whether the *injury* that a plaintiff alleges is likely to be redressed through the litigation." *Ibid.* And the complaint says nothing and does nothing about redressing *Regalado*'s retaliation (non-) injury,

which is the only legally relevant injury. Nor does petitioner's theory of "close association" litigation for his own damages provide any mechanism for courts to ensure that the legally-injured-but-not-suing individual is remediated by the litigation.

Instead, petitioner's argument seems to do one of two things. Either it adopts a legally conclusive presumption that the protected employee will have her interests redressed and vindicated by the close associate's litigation – a presumption that, while maybe true in happy marriages and happy families, ignores the reality that not all family members, and certainly not all close associates, are so cooperative. Or petitioner is, in actuality, creating a new and *independent* legal right and remedy for all of a protected employee's self-proclaimed "close associates" not to be subject to adverse treatment by their employers, even though they engaged in no protected conduct themselves. Whichever it is, the law forecloses it.

* * * * *

To be clear: petitioner's argument is that (i) a plaintiff who has no injury to a legally protected right of his own can sue (ii) to enforce the rights of a third party, even if the third party claims no injury of her own and faces no barrier to suit herself, (iii) for the sole purpose of recovering damages and relief that run exclusively to him – not to the third party – and (iv) bear no relation to the third party's remedial rights, (v) based on nothing more than an alleged "close association" with the third party. Apart from the Article III queasiness generated by that argument, *cf. Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring),

the claim presses the Court to ignore the words that Congress wrote and to adopt a rule that raises deep-seated prudential standing concerns that the statutory text does not expressly negate.

And for what? Maybe all that pushing of the standing doctrine and judicial revamping of statutory text in service of an anomalous claimant would be worthwhile if it served some crucial good. But that is not so here. As the United States tells us, third-party lawsuits are not necessary to achieve the remedial purposes of Title VII, as the rule against them "does not leave a substantial gap in Title VII's coverage." U.S. Cert. Br. 11. On the other hand, petitioner's rule would cause the number of meritless retaliation claims not only to increase, but potentially to multiply, as every instance of protected conduct would give rise to an untold number of plaintiffs, each claiming a "close association" with the protected employee. Employers would face impossible compliance burdens and massive litigation costs as this potentially limitless class of "aggrieved" plaintiffs deploys retaliation claims to thwart management decisions with which they disagree.

Under these circumstances, the better answer is to leave standing principles and the statutory text intact. Those who have offered some measure of assistance or support to close associates in pressing their claims can file suit under Section 2000e-3. So can those protected employees who are themselves the victims of impermissible retaliation. Congress can decide the proper treatment of the rest.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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AMICUS CURIAE BRIEF

No. 09-291

IN THE

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ERIC L. THOMPSON,
Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL, NATIONAL ASSOCIATION OF MANUFACTURERS AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF RESPONDENT

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The Equal Employment Advisory Council, National Association of Manufacturers and the National Federation of Independent Business Small Business Legal Center respectfully submit this brief as *amici curiae*. The brief supports the position of Respondent before this Court in favor of affirmance.[1]

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person

INTEREST OF THE *AMICI CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership includes over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role of manufacturing to America's economic future and living standards.

The National Federation of Independent Business (NFIB) Small Business Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB is

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other than *amici curiae*, their members or their counsel made a monetary contribution to its preparation or submission.

the nation's leading small business association, with offices in Washington, DC and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents over 300,000 member businesses nationwide. The NFIB Small Business Legal Center represents the interests of small business in the nation's courts and participates in precedent setting cases that will have a critical impact on small businesses nationwide, such as the case before the Court in this action.

All of EEAC's members, and many of NAM's and NFIB's members, are employers subject to Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.*, and other federal and state employment nondiscrimination laws. As potential defendants to claims of discrimination under Title VII, *amici's* members thus have a direct and ongoing interest in the issue of whether an individual can state a claim for unlawful retaliation under Title VII based solely upon the protected conduct of an individual who is a relative or close associate. The *en banc* court below properly concluded that the plain text of Title VII does not support the viability of such "friends and family" retaliation claims.

Because of their interest in the application of the nation's fair employment laws, EEAC, NAM and/or NFIB Small Business Legal Center have filed *amicus curiae* briefs in a number of cases before this Court involving the proper interpretation of Title VII,[2] as

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[2] *See, e.g., Lewis v. City of Chicago*, 130 S. Ct. 2191 (2010); *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009); *Crawford v. Metro. Gov't of Nashville*, 129 S. Ct. 846 (2009); *Ledbetter v. Goodyear*

well as those involving other important labor and employment issues.[3] Given their significant experience, *amici* are well-situated to brief this Court on the ramifications of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioner's employment was terminated for performance-related reasons shortly after Respondent, his employer, was served with notice of an administrative charge of discrimination that had been filed with the U.S. Equal Employment Opportunity Commission (EEOC) by his co-worker and then-fiancée (now wife), Miriam Regalado. Pet. App. 3a. He sued Respondent in federal court, accusing it of unlawfully retaliating against him based on the protected activity of Regalado, with whom he is closely associated, in violation of Section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e *et seq.* Pet. App. 4a. Petitioner does not allege that he was retaliated against based on his own statutorily protected activity, but instead contends that Section 704(a) confers an independent right of action for so-called "third party" retaliation. *Id.*

Tire & Rubber Co., 550 U.S. 618 (2007), *superseded by statute on other grounds*, Lilly Ledbetter Fair Pay Act, 123 Stat. 5 (2009); *Burlington Northern & Santa Fe Rwy. Co. v. White*, 548 U.S. 53 (2006); and *AMTRAK v. Morgan*, 536 U.S. 101 (2002).

[3] *See, e.g.*, *Gross v. FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009); *Kolstad v. American Dental Ass'n*, 527 U.S. 526 (1999); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); and *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

In granting Respondent's motion for summary judgment, the district court concluded that Petitioner failed to show that he was the victim of unlawful "association" discrimination based on his advocacy of women or minorities or because "his relationship with his wife made [his] own race or gender the basis of his employer's discrimination." Pet. App. 101a. It also found that Petitioner Thompson failed to demonstrate that he participated in a Title VII proceeding or otherwise opposed discriminatory conduct such that he was entitled to pursue a retaliation claim in his own right. *Id.* Lacking Sixth Circuit guidance on the question of third party coverage, the district court was persuaded by the plain text of Title VII, which it found extends protection only to individuals who actually have opposed discrimination or have participated in a Title VII proceeding. *Id.* at 102a-103a.

A divided, three-judge panel of the Sixth Circuit reversed. While acknowledging that the plain language of Title VII suggests that only the individual who has opposed discriminatory employment practices or participated in a Title VII investigation or proceeding is protected from retaliation, the panel majority nevertheless concluded that not expanding the statute's anti-retaliation provision to cover third party claims would undermine the purposes of Title VII. *Id.* at 74a.

On Respondent's petition for rehearing *en banc*, the court below vacated the panel decision and affirmed dismissal of Petitioner's retaliation claim. It determined that the plain text of Title VII establishes that the "authorized class of claimants" eligible to bring a Title VII retaliation claim is limited to those who themselves – and not through their relatives or close

associates – have engaged in statutorily protected conduct. Pet. App. 2a. The *en banc* majority observed that Section 704(a) expressly bars discrimination against an individual because *he* has opposed discrimination or because *he* has "made a charge, testified, assisted, or participated in any manner" in a Title VII proceeding. Pet App. 5a, 7a.

Because the actual text of the statute does not extend to those who have not personally engaged in statutorily protected conduct, the *en banc* majority concluded that it would be improper to judicially expand the scope of Section 704(a) in the manner urged by Petitioner, thus declining his "invitation to rewrite the law." Pet App. 9a. In doing so, it joined the Third, Fifth and Eighth Circuit Courts of Appeals, which also have refused to recognize a third party, or "friends and family," retaliation cause of action under Section 704(a). *Id.*

Petitioner filed a petition for a writ of certiorari, which this Court granted on June 29, 2010.

SUMMARY OF ARGUMENT

Section 704(a) of Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against any employee "because *he* has opposed any practice made an unlawful employment practice ... or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter]." 42 U.S.C. § 2000e-3(a) (emphasis added). Section 704(a) plainly protects *only* those who themselves have engaged in either "opposition" or "participation" protected activity; it does not permit friends and family to assert retaliation claims based on the protected activity of a loved one or associate. The *en banc* court

therefore concluded correctly, as have the Third, Fifth, and Eighth Circuits, that Section 704(a) precludes third party retaliation claims.

Despite having opportunity to do so, Congress thus far has declined to amend Section 704(a) to provide for a third party right of action as exists under other federal workplace protection laws. The Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, for instance, contains not only a provision prohibiting retaliation against those who "oppose" discrimination or "participate" in EEO proceedings, but also one that makes it unlawful for an employer "to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of ... or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act." 42 U.S.C. § 12203(b). This more expansive language has been construed by some courts as being sufficiently broad to permit claims by third parties injured by retaliatory conduct. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002).

On its face, Section 704(a)'s reach is limited to retaliation against persons who have engaged in statutorily-protected conduct. It is the responsibility of Congress, not the courts, to expand Title VII's scope to permit a cause of action for third party retaliation. This Court therefore should decline Petitioner's invitation to interpret the statute in such a manner. Not only would such an interpretation be improper, but it also would be unnecessary, since Section 704(a) already contains sufficiently broad anti-retaliation protection for those who themselves oppose discriminatory employment practices or par-

ticipate in EEO proceedings on behalf of a close associate.

The decision below adheres not only to the plain text of Title VII, but also serves the broader purposes of the Act by maintaining a framework for protection that is broad in scope, but which does not unnecessarily undercut important interests of the employer community, including the ability to manage their workforces without fear of being accused of retaliation based solely on the conduct of others somehow connected to or associated with the complaining party. A rule permitting third parties to sue for retaliation based on the protected activity of their relatives or close associates also would create substantial confusion in the courts, and among employers seeking to comply with the law, regarding which relationships or associations qualify for anti-retaliation protection.

ARGUMENT

I. THE PLAIN AND UNAMBIGUOUS TEXT OF TITLE VII SUPPORTS THE WIDELY ACCEPTED VIEW THAT ONLY INDIVIDUALS WHO THEMSELVES HAVE ENGAGED IN PROTECTED ACTIVITY MAY BRING A SECTION 704(a) WORKPLACE RETALIATION CLAIM

A. The Third, Fifth And Eighth Circuits All Have Concluded Correctly, As Did The Court Below, That The Plain Text Of Section 704(a) Precludes Third Party Retaliation Claims

Section 704(a) of Title VII expressly provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of

> his employees or applicants for employment ... because *he* has opposed any practice made an unlawful employment practice by this [subchapter], or because *he* has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this [subchapter].

42 U.S.C. § 2000e-3(a) (emphasis added). In comparison, Title VII's substantive nondiscrimination provision states:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's* race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (emphasis added).

Unlike Title VII's nondiscrimination provision – which bars employment bias based on an individual's *status* as member of a protected class – its anti-retaliation provision "seeks to prevent harm to individuals based on *what they do, i.e.*, their *conduct*." *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53, 63 (2006) (emphasis added). Thus, a critical element of a retaliation plaintiff's prima facie case is that he or she actually personally "opposed" a discriminatory employment practice or personally "made a charge, testified, assisted, or participated" in a Title VII proceeding. 42 U.S.C. § 2000e-3(a).

The *en banc* court below therefore was correct in refusing to recognize Petitioner's third party retaliation cause of action, which is premised on someone else's protected conduct. In doing so, it joins three

other courts of appeals, and a number of federal district courts, in soundly refusing to extend Section 704(a)'s scope to encompass such claims. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 569 (3d Cir. 2002); *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 819 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224, 1226-27 (5th Cir. 1996); *see also Torres v. McHugh*, 701 F. Supp. 2d 1215, 1219-20 (D.N.M. 2010) ("When presented with this question, all four Courts of Appeals held that, in order to bring a retaliation claim under Title VII, the plaintiff must have personally engaged in some form of protected activity. Mere association with a person who engaged in protected activity is not sufficient").

While considering whether public policy might be better served by a rule allowing a cause of action under Title VII for those who suffer retaliation as a result of a close associate's protected conduct, the courts of appeals ultimately have concluded that it is not for the courts, but for Congress, to establish such an automatic rule of standing under the statute. *See Fogleman*, 283 F.3d at 569 ("The preference for plain meaning is based on the constitutional separation of powers – Congress makes the law and the judiciary interprets it. In doing so we generally assume that the best evidence of Congress's intent is what it says in the texts of the statutes"); *EEOC v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1247 (D.N.M. 2008) ("expanding the scope of persons by whom an action can be brought beyond the clear language of the statute is not within the purview of the courts, but is the responsibility of Congress").

Petitioner argues that "Congress undoubtedly anticipated that third party reprisals would be among the forms of retaliation to which employers might

resort," Pet. Brief at 16, pointing out that a number of federal statutes specifically bar certain forms of third party retaliation. *Id.* at 18. That Congress has seen fit to include explicit third party retaliation protection in other statutes but not in Title VII, however, only further undermines the notion that Section 704(a), by its terms, permits such a cause of action.

"'Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.'" *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (quoting *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004)). Because the text of Section 704(a) plainly applies only to those who personally have engaged in statutorily protected conduct, third party retaliation claims are not available under Title VII, and the court below was correct in refusing to allow Petitioner to proceed on that basis.

B. Third Parties Do Not Have Standing To Sue Under Section 704(a), And Even Assuming They Do, Third Parties Who Have Not Personally "Opposed" Discriminatory Employment Practices Or "Participated" In An EEO Proceeding Cannot State A Claim For Which Relief May Be Granted

Petitioner's contention that Section 706(f)(1) gives third party litigants standing to sue under Section 704(a) is equally incorrect. On its face, Section 706(f)(1) provides a right of action only for those who personally have suffered protected-status discrimina-

tion in violation of Section 703 or engaged in protected activity under Section 704(a).

Section 706, codified at 42 U.S.C. § 2000e-5, begins by authorizing the EEOC to "prevent any person from engaging in any unlawful employment practice as set forth in section 703 or 704 of this title."[4] 42 U.S.C. § 2000e-5(a); among other things, Section 706 directs the EEOC to investigate charges filed by or on behalf of aggrieved persons "alleging that an employer ... has engaged in an unlawful employment practice ...." 42 U.S.C. § 2000e-5(b). After setting forth the rights and responsibilities of those seeking to file administrative charges of discrimination, Section 706 goes on, in subsection (f)(1), to grant a private right of action to the charging party "claiming to be aggrieved ... by an alleged unlawful employment practice." 42 U.S.C. § 2000e-5(f)(1).

Contrary to Petitioner's contention, Section 706(f)(1) provides only those who have been aggrieved by an unlawful employment practice, as defined in Sections 703 and 704, with a private right of action. Accordingly, Petitioner would have standing to sue under Section 706(f)(1) only if he alleged that he either was discharged because of his own race, color, religion, sex or national origin, or was retaliated against because he opposed discriminatory employment practices or participated in an EEO proceeding.

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[4] Section 703 defines "unlawful employment practice" as discrimination "because of" an individual's race, color, religion, sex or national origin, 42 U.S.C. § 2000e-2(a)(1), and Section 704 defines "unlawful employment practice" as discrimination against any employee because he has either opposed discriminatory employment practices or has "made a charge, testified, assisted, or participated in any manner" in a Title VII "investigation, proceeding, or hearing." 42 U.S.C. § 2000e-3(a).

As this Court has observed, "[s]tatutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme – because the same terminology is used elsewhere in a context that makes its meaning clear ...." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). To the extent that a Title VII plaintiff has standing to sue under Section 706(f)(1) only if he or she has suffered an "unlawful employment practice" as defined by Sections 703 and 704, Petitioner's contention that Section 706(f)(1) provides an independent basis for his third party retaliation claim is mistaken.

Unlike Title VII, the Americans with Disabilities Act (ADA), as amended, 42 U.S.C. §§ 12101 *et seq.*, not only prohibits retaliation against those who oppose discrimination or participate in proceedings under the Act, but also provides that "it shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of ... or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this Act." 42 U.S.C. § 12203(b). Based on its similarities to language contained in the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151 *et seq.*, courts have construed Section 12203 as allowing certain third party retaliation claims. *See Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 564 (3d Cir. 2002).

The ADA also contains a provision expressly prohibiting discrimination against those associated with individuals with disabilities. Under Section 102 of the ADA, an employer commits a discriminatory employment practice by "excluding or otherwise

denying equal jobs or benefits to a qualified individual because of the known disability of an individual *with whom the qualified individual is known to have a relationship or association* ...." 42 U.S.C. § 12112 (emphasis added).

Thus, even though Title VII and the ADA share a common goal of redressing unlawful workplace discrimination, Congress included an express association discrimination provision in the ADA, but not in Title VII. And although Title VII preceded the enactment in 1990 of the ADA, Congress had an opportunity, but declined, to include similar language in Title VII when it amended the statute in 1991 – only one year after it passed the ADA. Civil Rights Act of 1991 (CRA), Pub. L. No. 102-166 (1991). "When Congress amends one statutory provision but not another, it is presumed to have acted intentionally. Furthermore, as the Court has explained, 'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.'" *Gross v. FBL Fin. Servs.*, 129 S. Ct. 2343, 2349 (2009) (citations omitted).

Title VII does not contain broad anti-intimidation language or any provision expressly prohibiting discrimination against an individual based on his or her association with a member of a Title VII-protected class. Nor is there a single shred of textual support for creating an implied right of action or conferring "aggrieved person" status upon a third party who neither has (1) alleged discrimination because of *his* race, color, religion, sex or national origin nor (2) *himself* opposed Title VII discrimination or participated in a Title VII proceeding. Courts that have recognized an implied Title VII "association" dis-

crimination cause of action generally have done so on the basis that the plaintiff's *own* protected status actually resulted in the discriminatory employment practice, *e.g.*, but for the plaintiff's race (white), she would not have been subjected to unlawful workplace harassment based on her marriage to an African-American man. *See Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008) ("where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race"). Therefore, whether "aggrieved" in a broad sense or not, third party associates who have not personally engaged in statutorily protected conduct cannot state an actionable claim under Section 704(a).

C. The EEOC's Interpretation Of The Breadth Of Section 704(a), As Expressed In Its Compliance Manual, Is Not Entitled To Any Judicial Deference

As Petitioner has observed, "[s]ince 1984, the [EEOC's] Compliance Manual has stated that third party reprisals violate section 704(a)." Pet. Brief at 22 (footnote omitted). Nevertheless, and despite Petitioner's contention to the contrary, the EEOC's view that Section 704(a) provides a cause of action for third party retaliation by those who have not personally engaged in statutorily protected conduct is not entitled to any judicial deference.

EEOC interpretations contained in its *Compliance Manual* are not entitled to any deference under the principles established by this Court in *Chevron U.S.A., Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984). *See Ledbetter v. Goodyear Tire*

& Rubber Co., 550 U.S. 618, 643 (2007) ("we have previously declined to extend *Chevron* ... deference to the Compliance Manual, and similarly decline to defer to the EEOC's adjudicatory positions") (citation omitted), *superseded by statute on other grounds*, Lilly Ledbetter Fair Pay Act, 123 Stat. 5 (2009); *see also Christensen v. Harris County*, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference"). As Judge Griffin, dissenting from the panel majority's decision below, observed, "the EEOC cannot expand its own authority by simply publishing a compliance manual and expect the court to defer to its view that the statute means more than what the statutory language supports," pointing out that "at oral argument, counsel for the EEOC conceded that, in the present case, its compliance manual is not entitled to *Chevron* deference." Pet. App. 90a.

Furthermore, this Court has said that EEOC interpretive guidance is "'entitled to respect' under our decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161 (1944), but only to the extent that those interpretations have the 'power to persuade.'" *AMTRAK v. Morgan*, 536 U.S. 101, 111 (2002) (citations omitted). The EEOC in its *Compliance Manual* declares:

> Title VII, the ADEA, the EPA, and the ADA prohibit retaliation against someone so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights .... Retaliation against a close relative of

> an individual who opposed discrimination can be challenged by both the individual who engaged in protected activity and the relative, where both are employees.

EEOC Compl. Man. § 8-II(B)(3)(c): Retaliation, at 8-9 (1998 & Supp. 2010) (footnote omitted).[5] That the EEOC treats both Title VII and the ADA's anti-retaliation provisions in an identical manner, despite their textual differences, is reason enough to reject its policy position. Further justification is found, however, in the fact that the EEOC cites only four federal court decisions in support of its contention that third party retaliation is cognizable under Section 704(a), only two of which (district court rulings) arguably advance the agency's policy position. Indeed, neither of the appeals court decisions cited by the EEOC actually supports its sweeping contention that third party retaliation claims are available under Title VII. *See EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993); *Holt v. JTM Indus.*, 89 F.3d 1224 (5th Cir. 1996).

In *EEOC v. Ohio Edison Co.*, the plaintiff's employer withdrew an offer of reinstatement after the plaintiff's co-worker "protested [the plaintiff's] discriminatory discharge on his behalf and threatened that a claim would be filed for the discriminatory discharge." *Holt*, 89 F.3d at 1227 n.2. There, the Sixth Circuit "held that an employee is protected from retaliation where the employee's representative opposes a discriminatory practice." *Id.*

Expressly declining to extend third party retaliation protection to a plaintiff suing under a similar provision of the Age Discrimination in Employment

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[5] *Available at* http://www.eeoc.gov/policy/docs/retal.pdf, at 16.

Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, the Fifth Circuit in *Holt*, distinguishing *Ohio Edison*, explained, "the fact that the employee [in *Ohio Edison*] had engaged a 'representative' to act on his behalf to protest his discharge illustrates that the employee had opposed a discriminatory employment practice, as required under the anti-retaliation provision of Title VII." 89 F.3d at 1227 n.2. Forced to reconcile *Holt* with its own, contrary interpretation, the EEOC in its enforcement guidance merely states, "[t]he Commission disagrees with the Fifth Circuit's holding." EEOC Compliance Manual § 8-II(B)(3)(c): Retaliation, at 8-10 n.27 (1998 & Supp. 2010).[6]

For the reasons expressed above, the EEOC's view that Section 704(a) should – and therefore does – expressly prohibit retaliation against third parties is singularly unpersuasive and therefore is not entitled even to *Skidmore* deference.

II. SECTION 704(a) ALREADY CONTAINS SUFFICIENTLY BROAD ANTI-RETALIATION PROTECTION FOR THOSE WHO "OPPOSE" DISCRIMINATORY EMPLOYMENT PRACTICES OR "PARTICIPATE" IN EEO PROCEEDINGS

In addition to undermining the plain meaning of Title VII, expanding Section 704(a) to encompass claims of retaliation brought by third parties is unwarranted, since it "already offers broad protection to such individuals by prohibiting employers from retaliating against employees for 'assisting or participating in any manner' in a proceeding under Title VII." *Smith v. Riceland Foods*, 151 F.3d 813, 819

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[6] *Available at* http://www.eeoc.gov/policy/docs/retal.pdf, at 17.

(8th Cir. 1998) (citing *Holt*, 89 F.3d at 1226-27). As the Eighth Circuit in *Smith* observed, expanding Section 704(a) in such a manner thus "is neither supported by the plain language of Title VII nor necessary to protect third parties, such as spouses or significant others, from retaliation." *Id.*

Title VII already protects co-worker/relatives and co-worker/close associates who have taken purposeful action to support or assist in an individual's claim. Indeed, "[i]n most cases, the relatives and friends who are at risk for retaliation will have participated *in some manner* in a co-worker's charge of discrimination," *Holt*, 89 F.3d at 1227, which itself is statutorily protected conduct, either under Section 704(a)'s "opposition" clause or its "participation" clause. 42 U.S.C. § 2000e-3(a). *See also EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cir. 1993) (worker who opposes Title VII discrimination as the representative of another employee is protected under Section 704(a)).

Petitioner and his *amici's* declaration that "third party reprisals ... are not an isolated phenomenon, and instead reflect a pattern of retaliatory abuses ...," Brief *Amici Curiae* of the National Women's Law Center, at 15, is a gross exaggeration. They contend that "the number and breadth" of third party retaliation allegations brought in federal court over the years "suggest that employers not infrequently use such measures as a tremendously effective form of retaliation that may go unremediated unless the Court rejects the Sixth Circuit's rule," *id.* at 2, yet they refer to only about a dozen cases, the earliest of which dates back to 1995.

In Fiscal Year 2009, the Administrative Office of the U.S. Courts reported that a total of 14,036 em-

ployment discrimination actions (excluding ADA cases and approximately 1,500 docketed appeals) were brought in federal court. Admin. Ofc. of the U.S. Courts, *Judicial Bus. of the U.S. Courts*, Tables B-7 & C-2 (FY 2009).[7] In addition, "the number of retaliation claims filed with the EEOC has proliferated in recent years," *see Crawford v. Metro. Gov't of Nashville & Davidson County*, 129 S. Ct. 846, 855 (2009) (citations omitted), last year surpassing race discrimination as the most frequently-cited charge allegation. EEOC Charge Statistics (FY 2009).[8] If third party retaliation were as pervasive as Petitioner claims, surely the case law would amount to more than a handful of appeals court rulings and a dozen or so trial court decisions.

III. A RULE PERMITTING THIRD PARTIES TO SUE FOR RETALIATION BASED ON THE PROTECTED ACTIVITY OF THEIR ASSOCIATES WOULD CREATE UNACCEPTABLE CONFUSION IN THE COURTS – AND AMONG EMPLOYERS SEEKING TO COMPLY – AS TO WHICH RELATIONSHIPS OR ASSOCIATIONS WARRANT TITLE VII PROTECTION

Recognizing third party retaliation claims under Section 704(a) also would expose employers to the risk of having to defend lawsuits brought by an entirely new class of Title VII plaintiffs whose mere

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[7] *Available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/B07Sep09.pdf & http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C02Sep09.pdf

[8] *Available at* http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm

association with an individual who engaged in statutorily-protected conduct would give rise to a viable cause of action under the Act. As the Fifth Circuit observed in *Holt*, "if we hold that spouses have automatic standing to sue their employers for retaliation, the question then becomes, which other persons should have automatic standing to guard against the risk of retaliation?" 89 F.3d at 1227.

Indeed, what standard would a court apply in deciding whether or not the plaintiff made out a *prima facie* case, or in instructing a jury at the conclusion of trial? Would it be sufficient for a plaintiff to allege that (1) her employer is aware that she is friends with her co-worker, Charlie, (2) Charlie complained internally of discrimination, and (3) because of *Charlie's* conduct – which she asserts constituted statutorily protected activity – *she* was discharged? How would an employer, as a threshold matter, go about defending itself against such a claim?

Subjecting employers to the predictable flood of frivolous retaliation charges and lawsuits that would result from an expansion of Section 704(a) – despite the questionable need for such an interpretation – would frustrate their efforts to address workplace issues proactively and would impose an unmanageable burden on their compliance efforts. Employers would be placed in the untenable position of having to speculate about possible relationship(s) an employee may have that could give rise to potential liability each time they contemplate disciplinary or other action against that employee. Such an interpretation of Title VII would be at odds with the fundamental purpose of the statute, which was not intended to "'diminish traditional management prerogatives.'" *Texas Dep't of Community Affairs v.*

Burdine, 450 U.S. 248, 259 (1981) (quoting *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979)).

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The National Employment Lawyers Association (NELA), American Association for Justice (AAJ), AARP, Disability Rights Education and Defense Fund, Inc. (DREDF), Lawyers' Committee for Civil Rights Under Law (the Lawyers' Committee), and Legal Aid Society of San Francisco-Employment Law Center (LAS-ELC) are organizations dedicated to ensuring Congress's goal that workers have both the right to a discrimination-free work environment as well as effective procedures for the enforcement of this right. Consistent with Congress's intent and this Court's prior interpretations, the *Amici* fulfill the role of private attorneys general by assisting in the enforcement of these laws. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 602 (1981); *see N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) ("Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority'").

This case will substantially affect employee rights. It will determine whether all employees who are injured by unlawful retaliation have the right to challenge the unlawful action, or whether they must rely upon the employee who actually engaged in the protected activity to vindicate their rights. Based

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

upon *Amici*'s substantial experience supporting, monitoring, and enforcing anti-discrimination laws, their unequivocal position is that Title VII's anti-retaliation provision provides any employee, injured by an employer's unlawful retaliation, a cause of action. *Amici* believe that permitting any injured employee to pursue his own claim is indispensible to the efficient, effective enforcement of Title VII's anti-retaliation protections. More detailed background on the *Amici* follows.

NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment, and civil rights disputes. NELA and its 68 state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally treated in the workplace. As part of its advocacy efforts, NELA supports precedent-setting litigation and has filed dozens of *amicus curiae* briefs before this Court and the federal appellate courts to ensure that the goals of workplace statutes are fully realized. NELA's interest in this case is to ensure that Title VII's anti-retaliation provision is construed in a manner that protects employees from third-party reprisals.

AAJ is a voluntary national bar association. Its members primarily represent plaintiffs in personal injury suits, civil rights, and employment discrimination actions, and consumer litigation. It is AAJ's firm belief that the remedies Congress

provided in the civil rights statutes, including Title VII, serve both to compensate the victims of illegal discrimination and to foster equality and fair treatment for all Americans. AAJ is concerned that the lower court's narrow reading of Title VII's anti-retaliation provision will allow some employers to shield themselves from accountability under the statute.

AARP is a nonpartisan, nonprofit social welfare organization dedicated to addressing the needs and interests of older persons. AARP offers a membership to persons 50 years of age and older. Approximately half of those who have joined are in the work force and are protected by various federal employment discrimination laws, including Title VII of the Civil Rights Act of 1964, as well as the Age Discrimination in Employment Act of 1967. Vigorous enforcement of these laws, including Title VII, is of paramount importance to AARP, its working members, and the millions of older workers who rely on them to deter and remedy work place discrimination. AARP supports the rights of older workers and strives to preserve the legal means to enforce them.

DREDF, based in Berkeley, California, is a national non-profit law and policy center dedicated to advancing and protecting the civil rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board-led and staff-led by members of the community it represents. DREDF pursues its mission through education, advocacy, and law reform efforts, and works to ensure that people with

disabilities have the legal protections, including broad legal remedies, necessary to vindicate their right to be free from discrimination. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws, including Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA) of 1990. The ADA incorporates the remedies of Title VII of the Civil Rights Act with respect to employment discrimination claims pursued under ADA Title I, and thus DREDF has an interest in the judicial interpretation of Title VII.

The Lawyers' Committee is a nonprofit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. The Lawyers' Committee is interested in ensuring that Title VII's anti-retaliation provision is interpreted in a manner that fulfills the promise of "unfettered access to statutory remedial mechanisms."

LAS-ELC is a non-profit public interest law firm, the mission of which is to protect, preserve, and advance the workplace rights of individuals from traditionally underrepresented communities. Since 1970, the LAS-ELC has represented plaintiffs in cases involving the rights of employees in the workplace, particularly those cases of special import to communities of color, women, recent immigrants,

individuals with disabilities, LGBT individuals, and the working poor. The LAS-ELC's interest in preserving the protections afforded employees by federal anti-discrimination laws is longstanding.

SUMMARY OF ARGUMENT

The unquestioned purpose of section 704(a) of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §2000e-3(a) is to prohibit an employer's unlawful retaliatory conduct, which the Court has determined is conduct that a reasonable person would find interferes with "unfettered access to the statutory remedial mechanisms." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997). In Title VII, Congress sought to ensure a workplace free from discrimination and to provide a process for protecting these substantive rights. If an employee's right to be free from discrimination is not aggressively protected, the right to be free from discrimination becomes a hollow promise.

Title VII and the Court's interpretations of Title VII's anti-retaliation provision define the scope of unlawful retaliation; however, they do not specify who can bring a claim to challenge this unlawful conduct. Section 704(a), read literally, does not answer whether an employee who did not engage in protected activity, but was injured by an employer's unlawful retaliation, can bring a cause of action. Reading the statutory language in light of both Congress's intent and the Court's recognition of the purpose of the anti-retaliation protections compels the conclusion that third-party employees must be permitted to file claims to redress their own injuries.

Further, providing third-party employees the right to file for their own injuries caused by an employer's unlawful retaliation is consistent with the United States Equal Employment Opportunity

Commission's (EEOC) reasonable and longstanding interpretation of Title VII. Accordingly, this interpretation is entitled to deference. Finally, if a person is subject to an adverse employment action because of protected activity, sound public policy dictates that the injured person be permitted to file a claim. Such an interpretation of section 704(a) will not increase employer liability, nor will it burden either the EEOC or the courts with claims.

ARGUMENT

Petitioner has persuasively discussed in his brief why Mr. Thompson is an "aggrieved" party entitled to pursue a claim in his own right under Title VII. To the extent that the Court believes that in order to answer the questions presented it must determine whether section 704(a) provides a cause of action for a third-party employee, we believe that the language of the statute read in light of its purpose provides a third-party employee [2] a cause of action for retaliation.

I. Providing All Employees Injured By Unlawful Retaliation a Cause of Action Maintains the Integrity of Title VII.

Recently, the Court reiterated that the purpose of section 704(a) is to "avoid harm to employees." *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 852 (2009) (quoting *Faragher v. Boca Raton*, 524 U.S. 775, 806 (1998)).

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[2] In this brief, the term "third-party employee" refers to any employee injured by the employer's adverse employment action as a result of another employee's protected activity as defined by section 704(a).

Section 704(a) attempts to avoid harm to employees by making an employer's retaliatory actions unlawful if the conduct interferes with "unfettered access to statutory remedial mechanisms." *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 64 (2006) (quoting *Robinson*, 519 U.S. at 346).

Section 704(a) makes it an unlawful employment practice for an employer to "discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." Because section 704(a) is ambiguous, a strict literal interpretation is untenable. However, when this provision is examined within the context of the statute as a whole and the purpose of Title VII's anti-discrimination protections, the proper reach of the protections becomes clear. Any employee injured should be permitted to challenge the retaliatory action.

A. Section 704(a) Does Not Directly Answer Who Can File A Claim.

Section 704(a) is ambiguous as to whether it provides a third-party employee a cause of action for retaliation.[3] Ultimately, as instructed by this Court,

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[3] Prior to the Sixth Circuit's holding in *Thompson*, some courts believed that "[t]he plain text of the anti-retaliation provisions requires that the person retaliated against also be the person who engaged in the protected activity." *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 568 (3d Cir. 2002); *see also Smith v.*

the meaning of section 704(a) and the rights it creates must be gleaned from the context of the entire statute and the statute's purpose. *See, e.g.*, *Robinson*, 519 U.S. at 341.

The Sixth Circuit majority's myopic reading of the statute ignores this Court's rules of statutory interpretation by failing to consider section 704(a) within the broader context and purpose of Title VII. The majority read section 704(a) to require that the person filing the claim must also be the person who engaged in the protected activity, and it reasoned that the pronoun "he" within section 704(a) refers to one person: the person who engaged in the protected activity. *Thompson v. North American Stainless, LP*, 567 F.3d 804, 807 (6th Cir. 2009) (en banc).

However, as the Court has stated, the "plainness or ambiguity of a statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson*, 519 U.S. at 341. Moreover, "[i]t is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983).

Riceland Foods, Inc., 151 F.3d 813 (8th Cir. 1998); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996). These cases were decided before the Court's *Crawford* and *Burlington Northern* decisions, which highlighted the broad scope and purpose of the anti-retaliation protections and so are of questionable utility. *See supra*, Part I(B).

While Congress's use of the word "he" can be read to imply a limitation on the scope of the anti-retaliation protections, Congress's repeated use of "any" within the same section can alternatively be read to imply that Congress intended for the provision to have a much broader effect. Therefore, in light of Title VII's purpose, the Court could read section 704(a) as providing anti-retaliation protections to "any of [the employer's] employees" if any employee has opposed "any [unlawful] practice" or participated "in any manner" in the enforcement process. 42 U.S.C. § 2000e-3(a). A reasonable interpretation of this language is that by using "any," Congress sought to ensure that all employees were protected against unlawful retaliation. The confusion is created by the use of the word "he" later in the text, but this may have simply been Congress's way of making it clear that what makes a claim actionable is that *a person* needs to have engaged in protected activity.[4]

Indeed, if Congress wanted to limit a retaliation cause of action to only those who participated in opposing an unlawful employment practice, it could

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[4] Moreover, using "he" to modify "any of his employees or applicants" is grammatically awkward. When read literally, the statute prohibits an employer from discriminating against any of "his" employees because "he" [the employer] has engaged in protected activity. Despite the intervening clauses in the provision, the construction is unchanged. Thus, under standard principles of grammar, "he" modifies, independently, each of the preceding clauses of the provision, including the first provision. This illustrates the limits of a purely literal approach to an interpretation of this section which would ignore the statute's context and purpose.

have explicitly said so. For example, Congress could have said that it is an unlawful employment practice for an employer to "discriminate against [an] employee because [that] employee has opposed." Further, if the Sixth Circuit's interpretation is correct, it begs the question, why would Congress use the word "any?" The scope of section 704(a) is anything but clear: Congress's use of "any" in conjunction with "he" makes 704(a)'s scope ambiguous. As discussed *infra* Part II(A), reading the language as the Sixth Circuit majority did would require employees harmed by unlawful retaliation to rely on others to vindicate their rights—it is hard to fathom that this was the intention of Congress.

Further, the fact that many courts and jurists disagree on the meaning of section 704(a) also demonstrates its ambiguity. For example, although the Sixth Circuit claims to have been constrained by the plain language of section 704(a), the lack of a consensus among the judges as to the plain meaning of section 704(a)'s key terms speaks to the ambiguity of the statutory language.[5] The authors of the

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[5] The majority concluded that "he" means that 704(a) provides a cause of action only to the employee who engaged in protected activity. *Thompson*, 567 F.3d at 807. Concurring, Judge Rogers reasoned that the language of 704(a) does not address who may sue, *id.* at 817 (Rogers, J., concurring in the result), but concluded 704(a) impliedly prohibits third-party employee causes of action because he or she is not an "intended beneficiar[y] of the anti- retaliation provision." *Id.* In dissent, Judges Martin and Moore, each joined by five judges, concluded that "oppose" within the meaning of 704(a) should be construed broadly to give third party standing. *See id.* at 818 (Martin, J., dissenting); *id.* at 823-24 (Moore, J., dissenting). Finally,

opinions seemed to agree that section 704(a) prohibits third-party retaliatory conduct, but they disagreed as to whether the language addresses who holds a cause of action for retaliation.[6] In sum, the wide swath of opinion within one circuit court of appeal on three key issues concerning the meaning of section 704(a) demonstrates the ambiguity of the statutory language.

B. When Read in Context, Section 704(a) Provides a Cause of Action for an Employee Injured by Unlawful

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Judge White, joined by one other judge, disagreed with the other dissents in their conclusion that this controversy turned on a broad definition of "oppose." *Id.* at 829 (White, J., dissenting). He concluded that the meaning of "aggrieved" within 42 U.S.C. § 2000e 5(b) determines this controversy. *Id.* at 830. Nevertheless, Judge White also concluded that the petitioner should be permitted to amend his complaint to reflect that he "opposed" the employer; ultimately, therefore, Judge White's dissent concludes that this controversy could turn on the definition of one of 704(a)'s terms. *Id.* at 829.

[6] The majority concluded that section 704(a) describes third party retaliation as unlawful, but held that it confers a cause of action only upon the individual who engaged in the protected activity. *Thompson*, 567 F.3d at 807. Contrary to the majority, Judge Rogers, concurring, found that section 704(a) describes unlawful conduct and impliedly excludes third parties from having a cause of action. *See id.* at 817 (Rogers, J., concurring in the result) ("[Section 704(a)] dictates what practices amount to unlawful retaliation, not who may sue. . . . The question of who may sue is simply not addressed."). Judge White, dissenting, joined by one other judge, concluded that "the plain language of § 704(a)...does not tell us *who* falls under the umbrella of its protection, but, rather, *what* conduct is prohibited." *Id.* at 827 (White, J., dissenting) (internal citation and quotation omitted).

Retaliation, Even If That Employee Did Not Engage in Protected Activity.

Section 704(a) evinces Congress's intent to ensure that individuals who have engaged in protected activity have a claim for injuries caused by retaliation.[7] Within the context of the statute as a whole and the purpose of these protections, it is also reasonable to conclude that Congress intended to proscribe adverse employment actions taken against a third-party employee in retaliation for another employee's protected activity, and to permit the third party employee to file a claim on his own behalf.[8]

Over the past decade, the Court has sent a clear and consistent message—retaliation against employees because of an employee's exercise of a

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[7] It appears that all of the Sixth Circuit judges, and most of the other courts who have addressed this issue, agree that the person who engaged in the protected activity would have a claim for injuries to other employees harmed by the retaliation. *See Thompson*, 567 F.3d at 816 n.10 (quoting *Burlington Northern*, 548 U.S. at 63). Further, because Petitioner and the Solicitor General discuss this in detail, it will not be addressed further here. *See* Pet. Br. 9; Brief for the United States as *Amicus Curiae*, opposing *certiorari*, *Thompson v. North American Stainless, LP*, Supreme Court Docket 09-291 (May 25, 2010) (hereinafter "US Amicus at").

[8] Some members of the Sixth Circuit raised the issue regarding whether a third-party employee has either Article III or prudential standing. This issue has been addressed in detail in the Petitioner's brief and will not be repeated here. Title VII permits a claim by a "person aggrieved." *Thompson*, 567 F.3d at 809 (majority opinion). Termination surely qualifies under any definition of "injury" or "aggrieved."

statutorily protected activity will not be tolerated.[9] In these cases, the Court often looked beyond the literal words of the statute. In *Robinson*, the Court held that the anti-retaliation provisions applied not only to current employees, but to former employees as well. 519 U.S. at 346. The Court came to this conclusion despite arguments that the text of Title VII limited coverage to those having an existing employment relationship with the employer. *Id.* at 344-45. It also noted that this broad application was required to fulfill the goals of Title VII. *Id.* at 346.

In *Burlington Northern*, the Court stressed the importance of broadly interpreting the anti-retaliation provisions, and it observed that "[a]n employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing harm *outside* the workplace." 548 U.S. at 63; *see also Gomez-Perez v. Potter*, 128 S. Ct. 1931 (2008) (finding that the ADEA prohibits retaliation against a federal employee despite the fact that the statute does not expressly provide coverage). The text of the statute itself does not compel this interpretation.

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[9] The Court has interpreted these protections broadly both within the context of Title VII and in other statutes as well. *See CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008) (finding that workplace retaliation is actionable under 42 U.S.C. § 1981 even though the statute is silent on retaliation); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (finding that Title IX necessarily encompasses claims of retaliation for complaints of sex discrimination, even though Title IX does not mention retaliation expressly).

Similarly, in *Crawford*, the Court held that the opposition clause protected an employee's statements made, not on her own initiative, but in response to questions asked of her during an employer's internal investigation. The Court again noted that the more restrictive interpretation of this provision would undermine the statute's "primary objective" of "avoid[ing] harm" to employees. 129 S. Ct. at 852 (quoting *Faragher*, 524 U.S. at 806).

These cases illustrate the Court's desire to uphold Congress's intent to eliminate discriminatory and retaliatory practices from the workplace, even when Congress did not explicitly prohibit the employer conduct in question. Consistent with this precedent and to fulfill the congressional purpose of these protections, section 704(a) should be construed to permit a third-party employee to file a claim when he or she has been injured by retaliation, even if the retaliation was triggered by another employee's protected activity.

The Sixth Circuit majority's restrictive reading of section 704(a) creates unnecessary tension with the Court's most recent anti-retaliation decisions and undermines the purpose of these protections.[10] As the trial court here noted, "retaliating against the friends and relatives of employees who oppose unlawful employment practices will deter employees from exercising their protected rights just as much as retaliating against the employees themselves . . ." *Thompson v. North American Stainless, LP*, 435 F. Supp. 2d 633, 637 (E.D. Ky. 2006); *cf. EEOC v.*

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[10] *See supra*, Part I(A).

Nalbandian Sales, Inc., 36 F. Supp. 2d 1206, 1211 (E.D. Cal. 1998) (noting that "recognizing third-party retaliation claims effectuates the underlying purpose of Title VII's anti-retaliation provision and the statute's broad remedial purpose. To hold otherwise, would thwart congressional intent and produce an absurd result.").

At least one of the courts that felt constrained to limit their analysis to a purely textual review concedes that prohibiting a third party to file on his or her own behalf undermines the purpose of the statute. For example, in *Fogleman*, the Third Circuit acknowledged that the outcome of its literal reading of section 704(a) is inconsistent with the purpose of the law. "There can be no doubt that an employer who retaliates against the friends and relatives of employees who initiate anti-discrimination proceedings will deter employees from exercising their protected rights." *Fogleman*, 283 F.3d at 568-69.

The anti-retaliation provisions should not be used to allow the employer to accomplish indirectly that which he could not do directly. This case presents the Court with an opportunity to ensure that Congress's intent is construed in alignment with the statute's purpose. This clarification will eliminate the type of forced interpretation that was present in *Fogleman*, and it allows the type of legal analysis that is consistent with the spirit and letter of the law.

C. The Court Should Defer to the EEOC's Consistent, Longstanding, and Valid Interpretation of Section 704(a).

There is no need for the Court to chart its own course in interpreting section 704(a). Congress charged the EEOC with enforcing Title VII. For decades, the agency has taken the position that section 704(a) allows claims by employees other than those who have engaged in protected activity. This Court should defer to the EEOC's interpretation because it is a valid reading of 704(a)'s ambiguous language and furthers Title VII's purpose. [11]

In the past, the Court has accorded deference to the EEOC's interpretations of Title VII. Indeed, the Court has explained that EEOC interpretations are entitled to "great deference" when they are consistent with both the statutory language and purpose. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-44 (1971) (finding that because "the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress"). According such deference to the EEOC is in harmony with the Court's longstanding precedent that federal agency "rulings, interpretations, and opinions . . . constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance . . . ," dependent upon "the thoroughness evident in its consideration, the

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[11] Both the Solicitor General in its opposition to certiorari and the Petitioner discuss in some detail why deference is proper. *See* U.S. *Amicus* at 18; Pet. Br. 16-20.

validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade." *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In *Clackamas Gastroenterology Associates v. Wells*, in order to "best fill the gap" in a statutory definition that was "nominal" and "circular," the Court sought guidance from the EEOC's interpretation. 538 U.S. 440, 448-50 (2003). The Court has also relied on the EEOC's interpretive guidance in defining a cause of action for sexual harassment under Title VII. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-72 (1986) (deferring to EEOC guidelines and stating that it agreed "with the EEOC that Congress wanted courts to look to agency principles for guidance in this area").

The current EEOC Compliance Manual explains that "[a charging party] can challenge retaliation by [an employer] based on a protected activity by someone closely related to or associated with the charging party." 2 EEOC Compliance Manual §§ 8-I (B) (1998). The Manual further explains that the victim of retaliation has a cause of action where the employee who participated in the protected activity and the victim of retaliation are both employees. 2 EEOC Compliance Manual §§ 8-II (B) (3) (c) (1998).[12] This is a reasonable interpretation of Title VII's

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[12] The EEOC has consistently taken this position in its Compliance Manuals for at least 25 years. *See* EEOC Compliance Manual § 614.4(b) of the 1984 EEOC Compliance Manual; EEOC Compliance Manual § 614.3 of the 1988 EEOC Compliance Manual. Petitioner covers this in depth and it will not be repeated here. *See* Pet. Br. 16.

ambiguous anti-retaliatory provisions. *See supra*, Part I(B). It is reasonable for the actual aggrieved employee to challenge the employer's unlawful action against him. *See infra*, Part II. What is unreasonable, however, is an interpretation that would force the aggrieved party to rely on another employee to enforce the injured third party's rights.

In addition to the interpretative guidance provided by the EEOC Compliance Manual, the EEOC, when finding reasonable cause to believe a charge or adjudicating federal employee claims, has for over 30 years ruled consistently that third-party retaliation is covered by section 704(a).[13] Similarly, the EEOC has repeatedly interpreted section 704(a) to permit the third-party employee to file a claim for his or her own injury.

In 1977, the agency exercised jurisdiction to hear a retaliation claim filed by the family member of an employee who engaged in protected activity. EEOC Decision No. 77-34, 1977 WL 5345 (E.E.O.C. Aug. 16, 1977). Similarly, in 1986, the EEOC held that an employee who was terminated after his step-mother engaged in protected activity was able to "file an allegation of [retaliation] based on his step-mother's [protected activity]"; this decision overruled a previous agency ruling which denied the step-son a cause of action because he had not personally engaged in protected activity. *Straining v. U.S.*

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[13] Since at least 1972, the EEOC has held that third-party retaliation is unlawful under the equal opportunity employment laws. *See* EEOC Decision No. 72-1267, 1972 WL 4006 (E.E.O.C. Mar. 6, 1972).

Postal Serv., Doc. No. 01842459, 1986 WL 635174 (E.E.O.C. July 10, 1986). *See also Sellard v. U.S. Postal Serv.*, Doc. No. 01862682, 1987 WL 908508 (E.E.O.C. Nov. 3, 1987) (finding that denying the aggrieved third party a cause of action "constitute[d] an error of law" and that the appellant "ha[d] standing to allege [retaliation] based on his mother's protected activity."); *Ray v. TVA*, 1982 WL 532146 (E.E.O.C. Aug. 19, 1982) (finding that "[t]he agency must accept and process petitioner's allegation of reprisal based on his wife's [protected activity]."

The EEOC has continued to take this position. For example, in *Bates v. Widnall*, the Commission explained that the "Appellant clearly allege[d] that as a result of her son's [protected] activity, she was subjected to an inquiry into the manner in which she performed her duties [and that this was] sufficient to state a claim." Doc. No. 01963655, 1997 WL 332902 (E.E.O.C. June 10, 1997). *See also Alexander v. Peters*, Doc. No. 05980788, 2000 WL 1218139 (E.E.O.C. Aug. 17, 2000) (ruling that both spouses may bring a claim in the case of retaliation against the spouse who did not engage in protected activity) (citing *Thurman v. Robertshaw Control Co.*, 869 F. Supp. 934, 941 (N.D. Ga. 1994)).

Further, the EEOC has advocated that an aggrieved third party has his own cause of action under section 704(a) when it litigates cases as the federal agency charged with enforcing Title VII. In *Nalbandian Sales,* 36 F. Supp. 2d at 1211, the district court agreed with the agency's "long-standing policy [of] recognizing and enforcing third-party retaliation claims" and upheld a brother's right

to sue after he was retaliated against due to his sister's protected activity. Similarly, the EEOC argued, and the Sixth Circuit agreed, that the plaintiff had a cause of action when she alleged that she was retaliated against as a result of her husband's protected activity. *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 544 (6th Cir. 1993). The EEOC has argued this position in subsequent cases as well, even though in these cases the district court did not adopt the EEOC's position. *See EEOC v. V & J Foods, Inc.*, No. 05-194, 2006 WL 3203713 at *11 (E.D. Wis. Nov. 3, 2006), *rev'd*, (arguing on behalf of an employee terminated as a result of a relative's informal sexual harassment complaint when the relative was not employed by the company), 507 F.3d 575 (7th Cir. 2007); *EEOC v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1243 (D.N.M. 2008) (arguing that an injured third party has standing to sue when retaliated against for his mother's protected activity).

Additionally, the EEOC has consistently advocated for this interpretation in their *amicus* briefs. In *D'Aragona v. BellSouth*, the claimant alleged that he was unlawfully terminated because of his uncle's protected activity. 281 F.3d 1284 (11th Cir. 2001) (mem.). The EEOC filed an *amicus* brief in the Eleventh Circuit in support of D'Aragona's standing to file a claim. In opposition to BellSouth's argument that "if a related co-worker was allowed to challenge the employer's retaliation against him, it would lead to a situation in which 'everyone would be protected' from retaliation," the EEOC explained, "given Congress's desire to ensure unfettered access

to statutory remedial mechanisms, it is unclear why BellSouth views comprehensive protection from retaliation as inconsistent with Congress's goals." Brief of EEOC as *Amicus Curiae* in Support of Appellee at 11, *D'Aragona v. BellSouth Communications*, 281 F.3d 1284 (11th Cir. 2001) (No. 00-15550), *available at* 2001 WL 34137504.

Similarly in the Third Circuit, an employee alleged that his employer had unlawfully retaliated against him because of his father's participation in protected activity. *Fogleman*, 283 F.3d at 564. On appeal, the EEOC supported Fogleman's standing to sue and explained that if the district court's denial of standing remained in effect, it would "deal a severe blow to the enforcement of the anti-discrimination statutes." Brief of the EEOC as *Amicus Curiae* in Support of the Appellant at 2, *Fogleman v. Mercy Hosp. Inc.*, 283 F.3d 561 (3rd Cir. 2001) (No. 00-2263), *available at* 2001 WL 34119171. The EEOC further explained that the aggrieved third party has a claim if he can "establish a causal link between the adverse action and the protected activity of the other individual." *Id.* at 29.

Not surprisingly, the EEOC also filed an *amicus* brief in the Sixth Circuit in this case and argued that Thompson had standing to sue. Brief of the EEOC as *Amicus Curiae* in Support of Thompson and for Reversal, *Thompson v. North American. Stainless, LP*, (6th Cir. 2007) (No. 07-5040), *available at* 2007 WL 2477626. The EEOC urged the Sixth Circuit to follow its prior reasoning that "a plaintiff's allegation of reprisal for a relative's

antidiscrimination activities states a claim upon which can be granted under Title VII." *Id.* at 5.

The EEOC's longstanding interpretation of section 704(a) is a persuasive reading of the statute. It is consistent with both Congress's intent and the Court's broad view of Title VII's protections against workplace retaliation. This Court should defer to it.

II. Permitting a Third Party to File a Retaliation Claim in His Own Right Is Consistent with Congressional Intent and Will Not Burden the EEOC or the Courts with a Flood of Additional Claims.

Title VII established a right to work in an environment free of discrimination. In enacting Title VII, Congress also created protections against unlawful employer retaliation for an employee's exercise of this right. Congress envisioned a process where, in most cases, employees act as private attorneys general by having a role similar to the EEOC itself. *Associated Dry Goods Corp.*, 449 U.S. at 602.[14] This process is supposed to be initiated by "laypersons rather than lawyers." *Fed. Express*

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[14] The statute also envisions roles for the EEOC and the Department of Justice in pursuing claims. However, employees must make these agencies aware of the employer's unlawful conduct in order for the agencies to file a claim. If employees are deterred from complaining because they have witnessed unlawful retaliation, these agencies have no basis for taking action. Additionally, as the Court has noted, the EEOC plays a limited role in securing relief for victims of unlawful discrimination, recognizing that the EEOC files suit in "a small fraction of the charges employees file." *EEOC v. Waffle House*, 534 U.S. 279, 290 n.7 (2002).

Corp. v. Holowecki, 552 U.S. 389, 402-03 (2008) (quoting *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 124 (1988)). Because enforcement is employee-driven, it is vital that nothing deter individuals from asserting their rights under the Act. It is equally vital that employees injured by unlawful retaliation have the ability to seek redress for harms that they suffer. Denying third-party employees the right to file a claim will lead to results that are inconsistent with Congressional intent.

A. Congress Could Not Have Intended that a Third Party Injured by Retaliation Would Be Forced to Rely on Co-workers to Enforce Their Rights or that Employers Could Retaliate with Impunity.

Because Congress envisioned Title VII to function based on a system of individual complaints, it is unlikely that it intended to force any employee, injured by their employer's unlawful retaliation, to rely on another employee to enforce the rights of third parties. For example, if an employee sues her employer for gender discrimination, it is well established that the employer cannot retaliate against her. But, imagine that the employer says, "I know I can't go after you, but I'm going to fire three of your friends because you complained"? It is hard to believe that Congress intended to force the three fired employees to rely on the one employee left standing to enforce their rights. From a policy standpoint, it seems that when Congress prohibited retaliation in the workplace and provided that it is unlawful to discriminate against "any . . . employees

or applicants for employment," it intended this prohibition to allow *all* employees injured by unlawful retaliation to seek redress as "persons aggrieved." 42 U.S.C. §2000e-5(b).

Indeed, the person who is actually fired would be the logical person to initiate a claim with the EEOC. When an employee feels that his employer has unlawfully terminated him, all that he knows is that he has been harmed. When the employee knows he has been harmed, his first instinct is not to turn to a fellow employee and say, "I got fired because of your act, please go fix it for me." Rather, the first instinct would be to file a claim with the EEOC on his own behalf in hopes of securing redress. The EEOC, consistent with its longstanding interpretation of section 704(a), would agree and would allow the employee to file a claim. *See* discussion *supra* at Part I(C). Expecting the injured party to convince the employee who actually engaged in protected activity to file on his behalf is simply inconsistent with common sense and the framework of section 704(a).

The employee who actually engaged in protected activity may be deterred from instituting a claim on the fired employee's behalf for myriad reasons. Most importantly, the employee who engaged in protected activity may still have a job. A person is much more likely to file a charge if he or she is the subject of the adverse action. Furthermore, the employee may believe that instituting a claim on behalf of others may trigger another round of co-worker firings, or, as a practical matter, the employee simply may not want to file a suit on the fired employee's behalf.

The primary purpose of the anti-retaliation provision is to allow "unfettered access to statutory remedial mechanisms." *Robinson*, 519 U.S. at 346. Forcing injured employees to rely on co-workers is inconsistent with the statute's layperson-oriented framework. The employee's access to a remedy would be tightly tied to a co-worker's willingness and ability to file a claim on the aggrieved employee's behalf, frustrating the goal of providing "unfettered access."

Not granting injured third parties a claim could also lead to another result that would contradict congressional purpose and undermine the statute. As the trial court noted, "retaliat[ion] against a spouse or close associate of an employee will deter the employee from engaging in protected activity." *Thompson*, 435 F. Supp. 2d at 639. If employers are not accountable to third parties against whom they retaliate, unscrupulous employers may begin to retaliate with impunity and will inhibit the employees' willingness to file discrimination claims.

If a person is subject to a retaliatory, adverse employment action, public policy dictates that the injured person have the ability to sue. Title VII's framework cannot be squared with an interpretation that would require a layperson to convince a fellow employee to file on his or her behalf or that would allow employers to retaliate with impunity. To fully accomplish the statute's purpose, injured third parties must have the ability to file suit in their own right.

B. Allowing Third Party Retaliation Claims Has Not and Will Not Over-Burden EEOC or the Courts.

The respondent speculates that permitting third-party retaliation claims will open a Pandora's box of claims. Brief of the Defendant-Appellee North American Stainless, LP at 16-18 (6th Cir. 2007), *available at* 2007 WL 2477656.[15] This objection is one that is often made by employers; however, it is unsupported. A clear statement from this Court clarifying that third-party claims are permitted would reinforce the Court's repeated holding: the purpose of the anti-retaliation protections are to provide "unfettered access" to remedial mechanisms. Consistent application of this standard would clarify the substantive rights of employers and employees, even though, as a practical matter, it would not alter the procedural landscape.

Despite the fact that the EEOC and some courts have held third-party retaliation claims actionable since the 1970s,[16] no tidal wave of litigation has ensued. Even the Sixth Circuit concedes that there have not been a large number of claims. *Thompson*, 567 F.3d at 811 (quoting *Fogleman*, 283 F.3d at 569. Ironically, the Sixth Circuit uses the small number of claims to support its conclusion that there is no

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[15] *See also Fogleman*, 283 F.3d at 570 (recognizing that Congress may have feared that the expanding the class of potential plaintiffs would result in frivolous lawsuits).

[16] As provided *supra* in Part I(C), the EEOC and some courts have consistently maintained this interpretation in subsequent cases as well.

need to permit a third party to sue for his or her own injury. *Id.* at 810-11 (quoting *Fogleman*, 283 F.3d at 567-69). Although recognition of these claims has not spawned a flood of litigation, the rarity of such claims is not a basis to quickly dismiss as unimportant those instances where valid claims do occur.

An employee's burden of proving his or her case further undermines the respondent's fear of unchecked litigation is that employees must always prove their case. First, the employee must establish that he or she was harmed, because the anti-retaliation provision only protects an individual from "retaliation that produces an injury or harm." *Burlington Northern*, 548 U.S. at 68. Additionally, the third-party employee would have to show a causal connection between the protected conduct and the adverse employment action. The Second Circuit observed that it did not have to resolve the issue of whether the third party had standing to pursue the retaliation claim because they could not prove causation. *See Mutts v. S. Conn. St. Univ.*, 242 F. App'x 725 (2d Cir. 2007); *see also Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 609 (2d Cir. 2006) (holding plaintiff failed to establish the "causal connection between the protected activity and the adverse employment action"); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 520 (6th Cir. 2009) (holding that one plaintiff had not established her claim for retaliation because she could not "establish that her oppositional activity was causally connected to any tangible adverse employment action").

Courts are adept at dealing with causation issues, which are really at the heart of third-party retaliation claims; there is no basis to assume that explicit recognition of a third-party employee's right to challenge an employer's unlawful retaliation will burden the EEOC or the courts. This Court should continue to facilitate Title VII's true purpose by allowing the third-party employee to assert a claim when injured by retaliation.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* filing this brief in support of Petitioner Eric L. Thompson respectfully request that this Honorable Court REVERSE the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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ERIC L. THOMPSON,
Petitioner,

v.

NORTH AMERICAN STAINLESS, LP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL WOMEN'S LAW CENTER, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Section 704(a) of Title VII of the Civil Rights Act of 1964 forbids an employer from retaliating against an employee because he or she engaged in certain protected activity. The questions presented are:

1) Does section 704(a) forbid an employer from retaliating for such activity by inflicting reprisals on a third party – such as a spouse, family member or fiancé – closely associated with the employee who engaged in such protected activity?
2) If so, may that prohibition be enforced in a civil action brought by the third-party victim?

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INTEREST OF THE AMICI CURIAE

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, which includes the right to a workplace that is free from all forms of discrimination, including meaningful protection from retaliation. NWLC has prepared or participated in the preparation of numerous amicus briefs in cases involving sex discrimination in employment before this Court. It is joined in filing this brief by 26 organizations that share a longstanding commitment to civil rights and equality in the workplace for all employees. The individual organizations are described in the attached Appendix.[1]

SUMMARY OF ARGUMENT

While discrimination in the workplace has been unlawful since 1964, it is unfortunately still prevalent, and workers who report potentially unlawful behavior, file discrimination charges, or engage in other activity protected by Title VII remain vulnerable to retaliation by employers who seek to punish and deter them from such activity. This is especially true for women in male-dominated

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[1] Counsel of record states that the parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity -- other than the *amici curiae*, their members, and their counsel -- made a monetary contribution to the preparation or submission of this brief.

environments, as longstanding social science research makes clear that they experience higher levels of harassment and other forms of discrimination than do women in other fields. An extensive body of research further documents that fear of retaliation and other substantial barriers deter workers from reporting discrimination, and that such fears of retaliation are well-founded, especially for women in male-dominated fields.

If the decision below is not reversed, employers will be emboldened to punish a worker's close associates if the worker complains of discrimination, adding to the risks of reporting unlawful behavior and thus to the pressure to remain silent. Without employees who are willing to report unlawful conduct and file complaints, Title VII's goal of eliminating discrimination in the workplace cannot be achieved.

The case law reinforces research findings that fears of third-party retaliation are not unfounded. It reveals a wide variety of allegations of such employer reprisals against the family members or other close associates of workers who engaged in protected activity. The number and breadth of these allegations suggest that employers not infrequently use such measures as a tremendously effective form of retaliation that may go unremedied unless the Court rejects the Sixth Circuit's rule.

To ensure that Title VII's anti-retaliation provisions provide meaningful protection for workers who challenge possible job discrimination, this Court should reverse the decision below, and recognize that Title VII permits suit by an employee harmed by the

retaliatory actions of an employer in response to the protected activity of close associates.

ARGUMENT

Miriam Regalado worked as a quality control engineer at Respondent's stainless steel manufacturing plant in Kentucky. Plaintiff's Memorandum of Law Opposing Defendant's Motion for Summary Judgment at 6. Petitioner Eric Thompson also worked there. Pet. App. 3a. Ms. Regalado and Mr. Thompson began dating and later became engaged to be married; their relationship was "common knowledge" at the plant. *Id.*

Ms. Regalado was one of only a few women in Respondent's technical department. Plaintiff's Memorandum of Law Opposing Defendant's Motion for Summary Judgment at 8. She felt that her supervisors treated her differently because of her sex, *id.*, and that her subordinates did not respect her because of her supervisor's open disrespect of her. *Id.* at 9.

Ms. Regalado filed a charge of discrimination with the EEOC in September 2002, alleging that the Respondent had discriminated against her on the basis of gender. Pet. App. 3a. The EEOC notified the Respondent of this charge in February 2003. *Id.* Just over three weeks later, the Respondent fired Mr. Thompson, the Petitioner, even though he had received a performance-based pay increase just three months previously. *Id.*

Mr. Thompson alleges that Respondent terminated him in retaliation for Ms. Regalado's protected activity. *Id.* The *en banc* Sixth Circuit affirmed the district court's order granting the Respondent's motion for summary judgment, holding that Title VII's anti-retaliation protections provide a cause of action only for those individuals who have themselves engaged in protected activity. Pet. App. 2a.

As this Court has recognized, "Title VII depends for its enforcement upon the cooperation of employees who are willing to file complaints and act as witnesses." *Burlington Northern & Santa Fe Railway Co v. White*, 548 U.S. 53, 67 (2006). The allegations in this case illustrate the continuing problem of retaliation in the workplace as a deterrent to employees taking such action. In *Burlington Northern,* this Court also noted the wide range of ways in which an employer might punish and thus deter reports of discrimination and other forms of protected activity. 548 U.S. at 63-64. Firing or otherwise punishing a worker's close associates in retaliation for her protected activity is a particularly effective means of deterring such activity, and thus adds to the considerable barriers that discrimination victims face when challenging workplace bias. To ensure that Title VII's anti-retaliation provisions provide meaningful protection for workers who challenge possible job discrimination, and that Title VII can be enforced, this Court should recognize that Title VII permits suit by an employee harmed by the retaliatory actions of an employer in response to the protected activity of a family member or other close associate.

I. WORKERS – ESPECIALLY WOMEN IN TRADITIONALLY MALE JOBS – CONTINUE TO SUFFER DISCRIMINATION AND FACE SUBSTANTIAL PRESSURES TO REMAIN SILENT RATHER THAN REPORT SUCH DISCRIMINATION.

Miriam Regalado is an engineer and was one of only a few women in the Respondent's technical department at the time of the events in question. Plaintiff's Memorandum of Law Opposing Defendant's Motion for Summary Judgment at 8. Engineering remains a predominantly male job to this day. U.S. Bureau of Labor Statistics, *Household Data Annual Averages: Employed Persons by Detailed Occupation, Sex, Race, and Hispanic or Latino Ethnicity* (2009), available at http://www.bls.gov/cps/cpsaat11.pdf (reporting that women comprise only 10% of aerospace engineers, 18.4% of chemical engineers, 7.1% of civil engineers, 8.6% of computer hardware engineers, 9.4% of electrical engineers, 17.4% of industrial engineers, 5.9% of mechanical engineers, and 13.8% of "all other" engineers).

Workers in all fields remain vulnerable to harassment and other forms of discrimination, and this is especially true for women like Miriam Regalado in traditionally male jobs. As longstanding social science evidence makes clear, women in male-dominated environments experience higher levels of harassment and other forms of discrimination generally. For example, a ground-breaking early study focusing specifically on women in engineering found that female engineers frequently experience the

sort of sex discrimination alleged by Ms. Regalado. CYNTHIA COCKBURN, MACHINERY OF DOMINANCE: WOMEN, MEN AND TECHNICAL KNOW-HOW 185-86 (1985) (describing how male engineers frequently engaged in sexual stereotyping of their female colleagues by characterizing them as unable to master technology and as instead proficient at "boring and repetitive tasks" and at providing a pleasant atmosphere as "aspects of the décor"); *see also* Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1789, 1835 (1990) ("In nontraditional white-collar occupations, male workers – including elite professionals – also guard their territory against female incursion. Their conduct, too, runs the gamut from overtly sexual behavior, to discriminatory work assignments and performance evaluations, to day-to-day personal interactions that send women the message that they are 'different' and 'out of place.'").

As exemplified by the discrimination about which Miriam Regalado complained, these dynamics continue in a wide range of traditionally male occupations. *See* James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 GENDER & SOC'Y 301, 314 (1998) (finding that "predominantly male environments are more physically hostile and intimidating than other work environments. Women are more apt to be touched, grabbed, or stalked."); Shultz, *supra* at 1832 ("Overtly sexual behavior is only the tip of a tremendous iceberg that confronts women in nontraditional jobs. They

face a wide-ranging set of behaviors and attitudes by their male supervisors and co-workers that make the culture of nontraditional work hostile and alienating."); *cf.* NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 35: BEYOND THE HEADLINES 30 (2008) (describing ongoing barriers to women's progress in academic careers in science, technology, engineering, and mathematics). Indeed, this Court's recent docket highlights examples of proven discrimination experienced by women in such fields. *See Burlington Northern*, 548 U.S. at 57-59 (jury found that the plaintiff – a forklift operator and the only woman in the defendant railroad's maintenance department – had proved sex-based discrimination and retaliation); *Ledbetter v. Goodyear Tire & Rubber, Inc.*, 550 U.S. 618, 621-22 (2007) (jury found that female supervisor in tire plant had proved sex-based pay discrimination).[2]

The available research further demonstrates the substantial barriers that deter workers from reporting such harassment and other forms of discrimination. Fear of retaliation, for example, is the most significant barrier to reporting sexual harassment on the job, as numerous studies report that women fear that complaining about harassment will make things worse for them at work. *See* Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. SOC. ISSUES

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[2] The Supreme Court then dismissed her claim as time-barred, with a decision that was overturned by Congress in the Lilly Ledbetter Fair Pay Act of 2009, 42 U.S.C. § 2000e-5 (2009).

117, 122-23 (1995) (identifying fear of retaliation as the explanation most commonly provided by harassment victims for their decision not to take formal action challenging their experience of discrimination). "Studies of victims consistently report that fear of personal or organizational retaliation is the major constraint on assertive responding." *Id.* at 127; *see also* Cheryl R. Kaiser & Brenda Major, *A Social Psychological Perspective on Perceiving and Reporting Discrimination,* 31 LAW & SOC. INQUIRY 801, 818-19 (2006) (describing studies concluding that individuals who complain about discrimination suffer interpersonal costs because they are perceived as troublemakers).

Moreover, the workplace characteristics that increase the likelihood of discrimination also increase the likelihood of retaliation for reporting such discrimination. For these reasons, women in traditionally male jobs may especially fear retaliation, as a woman in such an environment who reports discrimination only heightens her visibility as an outsider and further deviates from the rules of the workplace culture. *See* Gruber, *supra* at 303 (concluding that "numerical dominance of the workplace by men heightens visibility of, and hostility toward, women workers who are perceived as violating male territory"). Indeed, "[b]ecause they are under great pressure to 'fit in,' women in nontraditional occupational occupations are less likely to report incidents of sexual harassment than their counterparts in more gender-traditional occupations." Deborah Erdos Knapp et al., *Determinants of Target Responses to Sexual Harassment: A Conceptual Framework,* 22 ACADEMY OF MANAGEMENT REVIEW

687, 703-04 (1997) (canvassing studies). As Deborah Brake observes, "[t]he fear of retaliation is particularly debilitating for persons with low-institutional power across multiple dimensions. For example, women who are especially isolated and tokens in their jobs, women in nontraditional employment, and women who are especially vulnerable in their jobs are more likely to be silenced by the threat or fear of retaliation." Deborah Brake, *The Function of Retaliation: Silencing Challengers and Preserving Existing Power Structures*, 90 MINN. L. REV. 18, 36 (2005).

An extensive body of evidence confirms that such fears of retaliation are well-founded, especially for women in nontraditional jobs. "Many retaliatory harassment cases, in particular, involve women in traditionally male-dominated employment sectors, such as law enforcement, manufacturing, and engineering." Rhonda Reaves, *Retaliatory Harassment: Sex and the Hostile Coworker as the Enforcer of Workplace Norms*, 2007 MICH. ST. L. REV. 403, 408 n.19 (canvassing examples); *see also* Jane Adams-Roy & Julian Barling, *Predicting the Decision to Confront or Report Sexual Harassment*, 19 J. ORG. BEHAV. 329, 334 (1998) (finding that those who formally reported harassment experienced more negative outcomes than those who did nothing); Mindy E. Bergman et al., *The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. APPLIED PSYCH. 230, 230 (2002) (summarizing studies finding that those who report harassment experience worsened job outcomes).

For these reasons, "[t]he widespread failure to confront discrimination publicly – by confronting the perpetrator, lodging an internal complaint, or filing an EEOC charge – is driven largely by an accurate perception that the costs of such responses will likely outweigh the benefits." Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System,* 86 N.C. L. REV. 860, 900 (2005); *see also* Bergman, et al., *supra* at 230-42 (surveying body of research on whistleblowing to conclude that workers engage in cost-benefit analysis when determining whether to report on-the-job wrongdoing).

Indeed, this Court has already acknowledged "the documented indications that '[f]ear of retaliation is the leading reason why people stay silent instead of voicing their concerns about bias and discrimination.'" *Crawford v. Metro. Gov't of Nashville & Davidson County,* 129 S. Ct. 846, 852 (2009) (*quoting* Brake, *supra* at 20). Employers' willingness to punish a worker's close associates for her protected activity only adds to these costs, and thus to the pressure to remain silent in the face of harassment and other forms of discrimination.

II. THE CASE LAW INDICATES THAT IT IS NOT UNUSUAL FOR EMPLOYERS TO RETALIATE AGAINST THE FAMILY MEMBERS AND OTHER CLOSE ASSOCIATES OF WORKERS WHO REPORT DISCRIMINATION, THUS ADDING TO THE PRESSURES ON WORKERS TO REMAIN SILENT.

The case law suggests the potential breadth of ways in which employers may engage in reprisals against the close associates of workers who engage in activity protected by Title VII and other federal employment laws. These take a wide variety of forms, including allegations that employers fired, suspended, refused to hire, or inflicted a hostile work environment upon spouses, partners, parents, children, and siblings in retaliation for workers' protected activity.

Consider, for example, the following: Debra Smith and Mark Thomas both worked for Riceland Foods, Inc. *Smith v. Riceland Foods, Inc.*, 151 F.3d 813, 815 (8th Cir. 1998). Their employer was aware that they were romantically involved and that they were contemplating marriage. *Id.* at 815-16. Ms. Smith, an African-American, applied for a plant operator position but was rejected in favor of a white male candidate with less seniority. *Id.* at 816. Believing that this decision was motivated by gender and race discrimination, Ms. Smith filed a charge with the EEOC in October 1995. *Id.* The employer then fired both Ms. Smith and Mr. Thomas in December 1995, claiming that they had falsified timesheets. Ms. Smith and Mr. Thomas contested

that claim and a jury found in favor of both plaintiffs, concluding that the employer had fired them in retaliation for Ms. Smith's protected activity. *Id.* at 816-17. On appeal, the court reversed the verdict for Mr. Thomas on the grounds that Title VII's anti-retaliation protections do not protect those individuals who have not themselves engaged in protected activity. *Id.* at 819.

As another example, consider the allegations of Wal-Mart employee Ramona Kay Bradford that her employer refused to hire her children in retaliation for her own protected activity. *E.E.O.C. v. Wal-Mart Stores, Inc.*, 576 F. Supp. 2d 1240, 1241-42 (D.N.M. 2008). Ms. Bradford filed a discrimination charge against her employer in August 2004. In October 2004 her daughter Robin applied for available positions for which she was qualified:

> Although she received positive feedback from her first interview, Robin was not called back for a second interview with a manager. Robin was not notified why she was not allowed to proceed in the hiring process. However, at least five individuals who had less schedule availability and lower qualifications than Robin were hired.

Id. at 1242. In January 2005, Ms. Bradford's son John interviewed for a position, only to be told that Wal-Mart was under a hiring freeze. "[B]ut, during the time that John's application was active, at least three other qualified individuals were hired." *Id.* The district court dismissed the retaliation claims of Robin and John on the grounds that Title VII's anti-

retaliation protections do not protect those individuals who have not themselves engaged in protected activity. *Id.* at 1246-47. The court, however, denied the defendant's summary judgment motion with respect to Ramona Bradford's retaliation claim, concluding that "[a] reasonable person in [her] position might be dissuaded from opposing discrimination or filing a charge of discrimination if that person believed a family member would not be employed," *E.E.O.C. v. Wal-Mart Stores*, No. 07-0300, 2009 WL 3028981 at *5 (D.N.M. Sept. 8, 2009), and that she had established genuine issues of material fact as to whether the defendant refused to hire her children because of her own protected activity, *id.* at *9.

Similarly, in *E.E.O.C. v. Nalbandian Sales, Inc.*, 36 F. Supp. 2d 1206, 1208 (E.D. Cal. 1998), a brother was allegedly denied rehire in retaliation for his sister's filing of a discrimination charge, stating that he had been told by a supervisor that he could not be hired back because of his family member's lawsuit. The federal district court denied the defendant's motion to dismiss, ruling that such third-party retaliation claims are actionable under Title VII. *Id.* at 1210-12.

Indeed, paralleling the allegations of Ms. Regalado and Mr. Thompson, women not infrequently report that their employers punished their spouses and partners in retaliation for their complaints of sexual harassment or other forms of discrimination. *See, e.g., Elsensohn v. Parish of St. Tammany*, No. 06-11393, 2007 WL 1799684 (E.D. La. June 19, 2007) (husband allegedly passed over for promotion and

otherwise subject to adverse actions in retaliation for his wife's successful settlement of an FMLA claim with their employer); *Whittaker v. N. Ill. Univ.*, No. 02-50503, 2003 WL 21403520 (N.D. Ill. June 16, 2003) (husband allegedly fired in retaliation for his ex-wife's complaint of sexual harassment); *Murphy v. Cadillac Rubber and Plastics, Inc.*, 946 F. Supp. 1108 (W.D.N.Y 1996) (husband allegedly suspended in retaliation for his wife's complaints of sex discrimination); *Holt v. JTM Indus., Inc.*, 89 F.3d 1224 (5th Cir. 1996) (husband allegedly placed on administrative leave and then transferred to another location in retaliation for his wife's age discrimination complaint); *McKenzie v. Atl. Richfield Co.*, 906 F. Supp. 572 (D. Colo. 1995) (husband allegedly suspended in retaliation for his wife's complaint of sexual harassment).

Men too may find their spouses or partners punished on the job in retaliation for their own reports of race discrimination or other protected activity. *See, e.g., Shoecraft v. Univ. of Houston Victoria*, No. 03-85, 2006 WL 870432 (S.D. Tex. Mar. 28, 2006) (wife's job allegedly eliminated in retaliation for her husband's protected activity); *E.E.O.C. v. Bojangles Rest., Inc.*, 284 F. Supp. 2d 320, 324 (M.D.N.C. 2003) (plaintiff alleged that employer did not permit her to return to her job after maternity leave in retaliation for her fiancé's plans to file an EEOC charge).

Other family members may also be at risk from retaliation for their loved ones' protected activity. *See, e.g., E.E.O.C. v. V & J Foods*, 507 F.3d 575, 577 (7th Cir. 2007) (daughter who had just turned 16 who

was sexually harassed by employer was fired after her mother complained; the employer objected that the daughter "had involved her mother in the matter rather than handling it 'like a lady'"); *Dias v. Goodman*, 214 S.W.3d 672 (Tex. App. 2007) (son allegedly fired in retaliation for his mother's filing of an age discrimination complaint against their employer); *Rainer v. Refco, Inc.*, 464 F. Supp. 2d 742 (S.D. Ohio 2006) (mother and son both fired on same day in alleged retaliation for mother's protected activity); *Fogelman v. Mercy Hospital*, 283 F.3d 561, 565-66 (3d Cir. 2002) (son allegedly fired in retaliation for his father's complaints of age and disability discrimination).

Although most of these decisions do not reach the merits, the number of reported cases indicates that third-party reprisals of the sort alleged by Mr. Thompson are not an isolated phenomenon, and instead reflect a pattern of retaliatory abuses that may go unremedied unless the Court rejects the Sixth Circuit's rule. This in turn will embolden employers to retaliate against third parties and further discourage the reporting of discrimination.

III. TO ENSURE EFFECTIVE PROTECTION FOR WORKERS WHO CHALLENGE DISCRIMINATION, THIS COURT SHOULD RECOGNIZE THAT TITLE VII PERMITS SUIT BY AN EMPLOYEE HARMED BY THE RETALIATORY ACTIONS OF AN EMPLOYER.

As this Court has observed, the goals of federal antidiscrimination laws "'would be difficult, if not

impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation.'" *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) (quoting brief of United States). If Title VII is to be enforced and discrimination is to be eliminated from the workplace, employees must not be intimidated from filing complaints. "Interpreting the antiretalilation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends." *Burlington Northern*, 548 U.S. at 67. Indeed, this Court has noted the wide range of ways in which an employer might choose to punish and thus deter reports of discrimination and other forms of protected activity. *See id.* at 68 (holding that Title VII's anti-retaliation protections prohibit all actions that a "reasonable employee would have found . . . materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination"); *id.* at 63-64 (citing as an example of unlawful retaliation the employer FBI's "refusal, contrary to policy, to investigate death threats a federal prisoner made against [the plaintiff employee] *and his wife*") (internal quotation marks and citations omitted; emphasis added).

The Sixth Circuit's rule, however, does not permit a Title VII challenge by a friend or family member punished on the job in retaliation for the protected activity of his or her close associate. It thus does not provide a meaningful deterrent to employers who seek to retaliate in that tremendously effective way, and instead chills protected activity because

workers considering such activity cannot be confident that their friends and family will be protected from reprisal.

Rather than permitting a third party like Mr. Thompson to bring suit himself and seek relief for the harm he suffered, the Sixth Circuit's rule instead offers an unsatisfactory alternative that fails to provide meaningful protection from retaliation. It suggests that the employee who engaged in protected activity – here, Ms. Regalado – should bring a retaliation suit herself, even though a court's ability to award damages or backpay to the third party based on a complaint filed by the employee who engaged in protected activity remains decidedly unclear. Indeed, some courts have denied claims seeking such relief on behalf of third parties on standing grounds. *See, e.g., Smith v. Frye*, 488 F.3d 263, 272-73 (4th Cir. 2007) (holding that son who engaged in protected activity lacked standing to seek relief for mother harmed by employer's reprisal).

As a practical matter, moreover, many employees may fail to realize that if one of them is fired or is otherwise the victim of a third-party reprisal, the *other* employee would have to file a charge with the EEOC within Title VII's very short limitations period[3] to preserve the claim.

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[3] Title VII generally requires that "[a] charge under this section shall be filed . . . within three hundred days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). Under certain circumstances, the limitations period is an even shorter 180 days. *See id.*

Because the Sixth Circuit's rule bars retaliation claims by the persons who are most directly injured, it thus bars claims by those who have the greatest incentive to pursue such claims (and to do so in a timely manner) and who are best positioned to claim and prove remedial relief. *See Singleton v. Wulff*, 428 U.S. 106, 114 (1976) ("The courts depend on effective advocacy, and therefore should prefer to construe legal rights only when the most effective advocates of those rights are before them."). Because such victims have suffered tangible employment injury, they are "persons aggrieved" by a violation of Title VII's section 704(a) within the meaning of section 706(f)(1). Therefore, they should not remain dependent on the decision of another party in order to pursue and receive relief. Indeed, the worker who actually engaged in the protected activity may sometimes be hesitant to file suit on a third party's behalf, especially if he or she has been deterred from further action by the employer's reprisal or if the relationship with the reprisal victim has changed.

Moreover, by holding that Title VII permits suit only by individuals who have themselves engaged in protected activity, the Sixth Circuit's rule could create a perverse incentive for all the friends, family members, and other close associates of a worker who has complained to engage in protected activity themselves – such as by filing a charge or reporting discrimination – to ensure their own safety from reprisal. This hardly seems an efficient or wise approach to antidiscrimination enforcement, as it would mean that the EEOC – and employers – would be flooded by otherwise unnecessary charges.

By limiting any third-party reprisal claim to the worker who engaged in protected activity – and excluding claims by the actual third-party victim – the Sixth Circuit's rule significantly, unnecessarily, and unwisely undercuts Title VII's anti-retaliation protections. To ensure that Title VII provides meaningful protection for workers who challenge possible job discrimination, this Court should instead recognize the broad scope of Title VII and allow an employee who suffers retaliation because of the protected activity of another to file suit and seek meaningful relief.

Such a rule would not create chaos in the workplace or the courts, despite Respondent's protestations to the contrary. *See* Respondent's Brief in Opposition at 31. To prevail on such a third-party reprisal claim, a plaintiff must still meet the challenge of proving causation – i.e., that he or she suffered an adverse employment action *because of* the protected activity of a close associate that would "'dissuade[] a reasonable worker from making or supporting a charge of discrimination.'" *Burlington Northern*, 548 U.S. at 67 (*quoting Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006). Upon such a showing, Title VII's strong anti-retaliation provision and its underlying purposes as interpreted by this Court make clear that an employer should not be able to evade that anti-retaliation provision and should be liable to the victim of its unlawful conduct.

CONCLUSION

For these reasons, the judgment of the Sixth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

INDIVIDUAL STATEMENTS OF INTEREST OF *AMICI CURIAE*

For 125 years, the *American Association of University Women* (AAUW), an organization of over 100,000 members, has been a catalyst for the advancement of women and their transformations of American society. AAUW members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,000 branches across the country, AAUW members work to promote education and equity for all women and girls through education, research, and advocacy. AAUW mobilizes advocates nationwide on priority issues, and chief among them is women's economic security and equal opportunity in the workplace. AAUW supports workplace fairness programs and civil rights laws that promote and enforce equal employment opportunities for women, especially those that diminish sexual harassment, promote pay equity, break the glass ceiling, and provide family friendly workplaces.

The *American Civil Liberties Union* (ACLU) is a nationwide, nonprofit, nonpartisan organization of more than 500,000 dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as amicus curiae, in cases including *Crawford v. Metropolitan Government of Nashville*, 129 S.Ct. 846 (2009), and *Burlington Northern & Santa Fe Railroad Co. v. White*, 548 U.S. 53 (2006). Through its Women's Rights Project, founded in 1972, the ACLU has long sought to ensure that the law provides robust legal protection from employment discrimination on the basis of sex, including meaningful protection against retaliation for bringing such discrimination to light. The

proper resolution of this case, which concerns retaliation against the fiancé of an employee who filed a sex discrimination charge with the EEOC, therefore is a matter of substantial interest to the ACLU and its members.

The *American Medical Women's Association* (AMWA) empowers women to lead in improving health for all within a model that reflects the unique perspective of women. Our organization functions at the local, national, and international level to advance women in medicine and improve women's health. We achieve this by providing and developing leadership, advocacy, education, expertise, mentoring, and strategic alliances.

AMWA is an organization of women physicians, medical students and other persons dedicated to serving as the unique voice for women's health and the advancement of women in medicine. The organization was founded by Dr. Bertha Van Hoosen in 1915 in Chicago, at a time when women physicians were an under-represented minority. As women in medicine increase in numbers, new problems and issues arise that were not anticipated. AMWA has been addressing these issues for 95 years.

This organization has stood for non-discrimination against women since its inception and for women being able to work in an environment free of harassment. AMWA also believes that friends or relatives should not suffer discrimination or harassment as punishment for the lawful action of a relative or friend to address such. AMWA has, thus, signed on to the brief, Thompson v. North American Stainless, in which the NWLC is filing with the Supreme Court to examine the question of whether an employee who was dismissed in retaliation for his fiancée's filing a complaint with the EEOC can sue to challenge his dismissal.

The *Asian American Justice Center* ("AAJC") is a national nonprofit, nonpartisan organization whose mission is to advance the civil and human rights of Asian

Americans. AAJC is a member of the Asian American Center for Advancing Justice. Collectively, AAJC and its affiliates - the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center - have over 50 years of experience in litigation, public policy, advocacy and community education on a range of civil rights issues, including discrimination. AAJC's longstanding interest in employment discrimination issues that impact Asian American and other underserved communities has resulted in the organization's participation in numerous amicus curiae briefs before the courts.

The *Association for Women in Science* (AWIS) is the premier advocate organization for women in science, technology, engineering and mathematics (STEM). Founded in 1971, AWIS has consistently been in the forefront of building pathways to advancement, better work place environments, and positive educational experiences for women in STEM.

A major problem that continues to pervade the STEM workforce and hinder equity in career success is gender discrimination. AWIS supports individuals' ability to speak out against discrimination they face in the workplace, and Title VII is intended to protect this right. However, if a third party may be retaliated against as a result of speaking out against discrimination, protections are not adequate. On behalf of the 7.4 million women in STEM, AWIS supports the petitioner Eric Thompson and respectfully asks the Supreme Court to reject the narrow interpretation of Title VII and include protection of a third party against employment retaliation.

AWIS is headquartered in Washington, D.C. with chapters throughout the United States. As a multi-disciplinary organization, AWIS is able to leverage and mobilize action on common issues facing women in STEM along the entire educational and career pipeline.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, the California Women's Law Center works in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination in employment. CWLC has authored numerous amicus briefs, articles, and legal education materials on this issue. The *Thompson v. North American Stainless* case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the amicus brief in this case.

Equal Rights Advocates (ERA) is a national non-profit law firm located in San Francisco, California dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation, advocacy, and a national toll-free legal hotline. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has litigated some of the nation's most important gender-based discrimination cases which have resulted in new law and provided significant benefits to large groups of women, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). ERA has represented clients in numerous individual and class sex discrimination cases under Title VII, including *AT&T Corp. v. Hulteen*, 129 S.Ct. 1962 (2009) and *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 3d (9th Cir. 2010), petition for cert. filed, (August 25, 2010) (No.10-277). ERA has also appeared as amicus curiae in a number of Supreme Court cases involving the interpretation of Title VII, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 U.S. Dist. LEXIS 19928; 66 Fair Empl. Prac. Cas. (BNA) 1886 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, 522 U.S. 1105 (1998); *Burlington*

Indus. v. Ellerth, 524 U.S. 742 (1998), *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); and *Ledbetter v. Goodyear*, 127 S. Ct. 2162 (2007). During the past three decades, ERA has worked closely with women in traditionally male jobs to expand and protect employment opportunities. ERA's advocacy work for these clients includes efforts to ensure that their worksites are free of discrimination and retaliation.

The *Feminist Majority Foundation*, a 501(c)(3) non-profit organization founded in 1987, is dedicated to the pursuit of women's equality, utilizing research and action to empower women economically, socially, and politically. FMF advocates for full enforcement of Title VII and other laws prohibiting discrimination and advancing workplace equality for women, and recognizes that full protection from retaliation against family members and associates is a necessary element to the adequate enforcement of Title VII.

Legal Momentum (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for forty years. Assuring women's equality in the workplace is central to Legal Momentum's mission, including ensuring equal employment opportunity for women in historically male-dominated jobs, such as firefighting, law enforcement, and the construction trades. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to promote women's access to these jobs by combating sex discrimination and retaliation. Legal Momentum is fully aware that discrimination against women remains pervasive, and is deeply concerned with ensuring that women and their allies may continue to challenge unlawful employment practices under Title VII without fear of retaliation.

Legal Voice is a regional non-profit public interest organization that works to advance the rights of all women

in Washington, Alaska, Montana, Idaho and Oregon, through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978 (as the Northwest Women's Law Center), Legal Voice has been dedicated to protecting and ensuring women's legal rights, including the right to equality in the workplace. Toward that end, Legal Voice has participated as counsel and as amicus curiae in cases involving workplace gender discrimination throughout the Northwest and the country. Legal Voice serves as a regional expert advocating for robust interpretation and enforcement of anti-discrimination laws protecting women.

Founded in 1996, the *National Asian Pacific American Women's Forum* (NAPAWF) is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American women and girls. The economic empowerment of all women is one of the central issues that forms the basis of NAPAWF's advocacy. NAPAWF supports the petitioner in this case because the persistence of discrimination and retaliation prevents women from achieving equality and economic security in the workplace.

Established in 1955, *the National Association of Social Workers* (NASW) is the largest association of professional social workers in the world with 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. The NASW, Kentucky Chapter has 1,600 members. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics*, conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession.

NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. The *NASW Code of Ethics* directs social workers to "engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully" . . . and to "act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of . . . sex." NASW policies support "ending sexual harassment and occupational segregation, which clusters women in low-paying, "pink-collar" occupations." NATIONAL ASSOCIATION OF SOCIAL WORKERS, *Women's Issues*, SOCIAL WORK SPEAKS, 367, 370 (2009).

Accordingly, given NASW's policies and the work of its members, NASW has expertise that will assist the Court in reaching a proper resolution of the questions presented in this case.

9to5, National Association of Working Women is a national membership-based organization of low-wage women working to achieve economic justice and end discrimination. 9to5's members and constituents are directly affected by sex and other forms of discrimination, sexual and other forms of harassment, and retaliation, as well as the difficulties of seeking and achieving redress for all these issues. Our toll free Job Survival Helpline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to protect women's rights in the workplace and end workplace discrimination. The outcome of this case will directly affect our members' and constituents' rights in the workplace and their ability to achieve redress for workplace discrimination, harassment and retaliation.

The *National Council of Women's Organizations* is a non-profit, non-partisan coalition of more than 230 progressive women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal gender participation in the economic, social, and political life of their country and their world. The Council addresses critical issues that impact women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other education rights to health and insurance challenges.

The *National Education Association* (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to opposing employment discrimination, including retaliation for complaining about sex discrimination and sexual harassment, and firmly supports the vigorous enforcement of Title VII.

The *National Organization for Women Foundation* is a 501(c)(3) organization devoted to furthering women's rights through education and litigation. Created in 1986, NOW Foundation is affiliated with the National Organization for Women, the largest feminist grassroots organization in the United States, with hundreds of thousands of supporters and contributing members in hundreds of chapters in all 50 states and the District of Columbia. Since its inception, NOW Foundation's goals have included closing the wage gap, eliminating sexual harassment and ending all other forms of sex discrimination in the workplace.

The *National Partnership for Women & Families* is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, access to quality health care, and policies that help women and men meet the dual demands of work and family. The National Partnership has devoted significant resources to combating sex, race, age, and other forms of invidious workplace discrimination and has filed numerous briefs amicus curiae in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of protected individuals in employment.

The *Older Women's League* (OWL) is a non-profit, non-partisan organization that accomplishes its work through research, education, and advocacy activities conducted through its chapter network. Now in its 30th year, OWL provides a strong and effective voice for the more than 70 million women age 40 and over in America. OWL has long advocated for equality and economic security, therefore we believe that all persons should be free from all forms of discrimination, including retaliation, in the workplace.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in efforts to combat discrimination in the workplace and promote equal rights, including efforts to protect the rights of women, issues which are directly involved in this case.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass

ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues in the workplace through public education and legal advocacy, most recently as amicus curiae before the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. Sheila White*, *BCI Coca-Cola Bottling Co. v. EEOC*, *Ledbetter v. Goodyear Tire & Rubber Company, Inc.* and *AT&T v. Hulteen*.

The *Sargent Shriver National Center on Poverty Law* (Shriver Center) champions social justice through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting low-income people. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to women's access to high-wage employment; this includes employment in nontraditional occupations. Discriminatory employment policies and practices have a negative impact on women's immediate and long-term employment and economic security. Nondiscrimination in all industries and occupations is vital if women are ever to obtain true economic well-being. The Shriver Center has a strong interest in the eradication of unfair and unjust employment policies and practices that limit women's economic opportunities and serve as a barrier to economic equity.

Sociologists for Women in Society is an international organization that focuses on protecting the rights of women and other disadvantaged groups against discrimination and advancing their status.

The Union for Reform Judaism ("Union") is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews. The Union has a long-standing commitment to equal rights and social justice. In a 1992 resolution on sexual harassment, the Union noted a "deficiency of adequate legal remedies to compensate for emotional trauma and to deter future harassment" and resolved that "victims should have available to them the full panoply of remedies afforded for other forms of discrimination and injury."

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Women Employed promotes fair employment practices, helps increase access to training and education, and provides women with information and tools to plan their careers. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly supports Title VII's provision against an employer retaliating against a third party closely associated with the employee who engaged in protected activity.

The *Women's Law Center of Maryland, Inc.* is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services, including an Employment Law Hotline, and advocacy, the Women's Law Center seeks to protect women's legal rights and ensure gender equality in the workplace.

The *Women's Law Project* (WLP) is a non-profit public interest law firm with offices in Philadelphia and

Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. Throughout its history, the WLP has worked to eliminate sex discrimination, bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. The WLP has a strong interest in the proper application of civil rights laws to provide appropriate and necessary redress to individuals victimized by discrimination.